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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 662

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee,

vs

OLIN E. DARBY,
Defendant and Appellant

STATEMENT AS TO JURISDICTION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal, respectfully represents:

I

This Court Has Jurisdiction Over This Appeal

A. *Statutory Provisions*

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States are Judicial Code, Section 1257, 28 U. S. Code, Section 1257,

Act of June 25, 1948, C. 646, 62 Stat. 929 (H. R. 3214), the relevant portions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) * * *

B. *Decisions Sustaining Jurisdiction*

The United States Supreme Court has jurisdiction to pass upon a federal question where it clearly and unmistakably appears from the decision of the highest court of the State that the federal question was assumed to be an issue, that the decision was against the claim of the federal right and was essential to the judgment.

Chambers v. *Baltimore & O. R. Co.*, 207 U. S. 142;
Cincinnati P. B. S. & P. Packet Company v. *Bay*, 200 U. S. 179.

The decision of the District Court of Appeal is final. The Supreme Court of the State of California has refused a hearing. It is subject to no further review or correction in any other state tribunal and it is an effective determination of the litigation.

Market Street Ry. Co. v. *Railroad Commission of State of California*, 324 U. S. 548;
Gospel Army v. *Los Angeles*, 331 U. S. 543.

The decision of the District Court of Appeal is the judgment of the State court of last resort having power to con-

sider the case when Petition for Hearing has been denied by the Supreme Court of California.

Pacific Gas & E. Co. v. *Police Court of City of Sacramento,* 251 U. S. 22;

Clark v. *Pennsylvania,* 128 U. S. 395.

The appellant, having been convicted under the challenged statutes, is the proper person to raise the question of their validity. He was held to be subject to the statutes by reason of his position as a member of the Los Angeles Board of Education. He therefore has an interest in the litigation and has suffered by the decision in the State court in favor of constitutional validity of the statute.

Tyler v. *Judges of Court of Registration,* 179 U. S. 405.

II

Statutes of California the Validity of Which Is Involved

The statutes of the State of California, the validity of which has been sustained by the Supreme Court of the State of California, the highest court of said State, as not being violative or repugnant to the provisions of the Constitution of the United States, are Section 1011 of the Education Code of the State of California (Statutes of 1943, C. 71, p. 310) and Sections 1090 and 1097 of the Government Code of the State of California (Statutes of 1943, C. 134, p. 896).

The Education Code

Division 2: Local Administrative Organization.

Chapter 1: Governing Boards.

Article 1: General Provisions.

Section 1011: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

Section 1013: "Any contract made in violation of Sections 1011 or 1012 is void."

THE GOVERNMENT CODE

Title I, Division 4. Public Officers and Employees.

Chapter 1: General.

Article 4: Prohibitions Applicable to Specified Officers.

Section 1090: "Members of the Legislature, state, county, judicial district and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." (As amended Stats. 1951, C. 1553, P. 3535.)

Section 1097: "Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of no more than one thousand dollars ($1,000), or by imprisonment in the State prison for not more than five years, and is forever disqualified from holding any office in this State."

III

Date of Judgment and Date of Application for Appeal

The District Court of Appeal of the State of California, Second Appellate District, Division Two, rendered its decision and judgment in the above entitled cause (114 A. C. A. 499) on November 26, 1952, affirming the judgment rendered on February 5, 1952, by the Superior Court of the State of California in and for the County of Los Angeles. A copy of the opinion of the District Court of Appeal is attached hereto and marked Appendix I.

A Petition for Rehearing was filed in the District Court

of Appeal on December 4, 1952, within the eight days after the decision prescribed by Rule 27(b) of Rules on Appeal. Rehearing was denied by said Court on December 5, 1952.

A Petition for Hearing was filed in the Supreme Court of the State of California on December 18, 1952, within the twenty-two days after the decision as prescribed by Rule 28(b) of Rules on Appeal. Hearing was denied by the Supreme Court on December 23, 1952.

All of the aforesaid decisions and judgments have become final.

The application for appeal to the United States Supreme Court was presented to the Presiding Justice of the District Court of Appeal, Second Appellate District, Division Two on the 24th day of February, 1953.

IV

Nature of the Case and Rulings of the Superior Court, District Court of Appeal, and Supreme Court of California.

The constitutionality of Section 1011 of the Education Code and Sections 1090 and 1097 of the Government Code was raised at every stage of the trial and on appeal of this case to the District Court of Appeal and the Supreme Court of California. Each time the constitutional questions were raised the Court decided in favor of the validity of the challenged statutes, thus bringing the case within the jurisdictional provisions relied upon in Section I above.

Appellant, a member of the Los Angeles Board of Education, was indicted on three counts by the grand jury of Los Angeles County, California, on October 11, 1951, for violation of Section 1011 of the Education Code of California (Statutes of 1943, C. 71, p. 310) and Sections 1090 and 1097 of the Government Code of the State of California (Statutes of 1943, C. 134, p. 896). Each count of the indictment al-

leged that the violation of these statutes consisted in being "interested as a member of the Board of Education" in contracts made by that Board.

Before plea appellant demurred to the indictment in the Superior Court on the ground that the statutes allegedly violated were repugnant to the Constitution of the United States. The demurrer was overruled by that court on November 19, 1952. Before plea, appellant also filed in the Superior Court Notice of Motion to Strike the gravamen of each count of the indictment on the grounds that it did not constitute requisite words and language for the pleading of any public offense under the laws of the State of California. He also filed a Motion to Set Aside Indictment under Section 995 of the Penal Code of the State of California on the ground that he had been indicted without reasonable or probable cause. On November 19, 1951 the Superior Court denied the Motion to Strike and the Motion to Set Aside Indictment.

Thereafter, within the period prescribed by law, appellant petitioned the District Court of Appeal for a Writ of Prohibition directed to the Superior Court restraining said court from proceeding with the trial of appellant on the indictment on the ground that the statutes allegedly violated failed to bestow upon the Superior Court any jurisdiction to try appellant, in that said statutes did not constitute a valid constitutional statement of a criminal offense for which appellant as a member of the Board of Education was indictable. The petition for Writ of Prohibition was denied by the District Court of Appeal without opinion on December 14, 1951. Thereafter, appellant filed a Petition for Hearing in the Supreme Court of California on the decision of the District Court of Appeal denying his petition for Writ of Prohibition. The Petition for Hearing in the

Supreme Court was denied without opinion on January 24, 1952.

Appellant was tried before a jury, which rendered a verdict on February 5, 1952 of guilty on Count 1 and not guilty on Counts 2 and 3, after which appellant filed a timely Motion for New Trial and Motion in Arrest of Judgment in which he challenged the jurisdiction of the trial court to pass judgment on the grounds that the statutes under which appellant had been convicted were void and unconstitutional. The Motion for New Trial and Motion in Arrest of Judgment were denied on February 25, 1952.

Appellant filed a timely appeal from the judgment of the Superior Court in which he again challenged the validity of the statutes allegedly violated on the ground that they were repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. On November 26, 1952 the District Court of Appeal of the State of California, Second Appellate District, Division Two, rendered its decision and judgment on said appeal affirming the judgment of the trial court and sustaining the constitutional validity of the statutes allegedly violated (114 A. C. A. 499). A timely Petition for Rehearing was filed in the same Court, which petition was denied.

Thereafter, a timely Petition for Hearing was filed in the Supreme Court of the State of California in which appellant challenged the validity of the statutes under which he was convicted on the grounds they were repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. On December 23, 1952 the Supreme Court of the State of California denied appellant's Petition for Hearing (40 A. C. Minutes p. 2), thereby sustaining the judgment and decision of the District Court of Appeal, which decision has now become final.

V

Stage in Proceedings and Method of Raising Federal Questions

1. *Pre-Trial Challenges to Constitutional Validity of Statutes and Decisions Thereon*

Appellant challenged the constitutional validity of Education Code Section 1011 and Government Code Sections 1090 and 1097 in his *Demurrer to Indictment* filed November 19, 1951, in the following manner:

"The defendant demurs to the indictment returned against him in the above entitled action on the following grounds:

XIV

"That the allegations of the indictment and each and every count thereof fail to state facts sufficient to constitute a cause of action for a public offense in that the statute in the Education Code allegedly violated is void and unconstitutional and confers no authority on the grand jury to inquire or upon this Court to try an indictment thereunder in that it purports by its terms to render an innocent state of mind or interest criminally punishable solely as the result of the acts and conduct of others without the knowledge or complicity of the accused."

XV

"That the allegations of the indictment and each and every count thereof are insufficient to state a cause of action for a public offense in that the statutes allegedly violated are void and unconstitutional in that the terms and provisions thereof are ambiguous, uncertain and indefinite as to apply equally to innocence as to guilt, and an indictment thereunder is beyond the authority of the

Grand Jury to return and confers no jurisdiction upon this Court."

XVI

"That the allegations of the indictment and each and every count thereof are insufficient to state a cause of action for a public offense in that the statutes allegedly violated are void and unconstitutional in that they fail to define or establish ascertainable standards of conduct for the guidance of persons of common intelligence, and an indictment thereunder is derogation of rights of liberty and life guaranteed by the Constitutions of the United States and of the State of California, and said statutes confer no authority on the Grand Jury to inquire thereunder and vest no jurisdiction upon this Court to try or hear a prosecution therefor."

The Superior Court overruled appellant's Demurrer to Indictment on November 19, 1951.

Appellant also challenged the constitutional validity of the aforesaid statutes in his *Motion to Set Aside Indictment* filed November 5, 1951, as follows: "The mere relationship of membership in the Board of Education and an interest in a contract made by said board is as consistent with innocence as with guilt, and an indictment for such relationship without evidence of knowledge, intent, or of any act of commission or omission is in deprivation of constitutional guarantees of the Constitution of the United States and of the Constitution of California."

Upon the denial of appellant's Motion to Set Aside Indictment and overruling of the Demurrer to Indictment by the Superior Court, appellant filed his *Petition for Writ of Prohibition* on December 4, 1951 with the District Court of Appeal. In said petition appellant challenged the constitutional validity of the statutes in question in the following manner:

"The Interest Statutes Alleged Are Unconstitutional"

(a) A Statute Which Would Apply Criminal Penalties to a Lawful Interest Solely as a Result of the Acts of Others Without the Knowledge or Participation of the Accused Person Is Unconstitutional.

"(b) A Statute Whose Terms Are so Ambiguous That Men of Common Intelligence Must Guess as to What Interests of What Officials Are Prohibited, Is Unconstitutional."

(Petition for Writ of Prohibition, p. 55, 60).

These contentions were supported by extensive points and authorities, concluding, "From these constitutional authorities, it can only be concluded that the statutes allegedly violated, if construed as criminal statutes, are void and unconstitutional in violation of the due process guarantees of the Constitutions of the United States and of the State of California, in that they apply to innocent and lawful interests without any conduct at all and establish no ascertainable standards of what interests are prohibited to what officials."

The District Court of Appeal denied the Petition for Writ of Prohibition on December 14, 1951. Appellant then filed his Petition for Hearing by the Supreme Court in which he again raised the constitutional questions in the same manner as in the Petition for Writ of Prohibition presented to the District Court of Appeal. (Petition for Hearing by the Supreme Court, p. 10-15). The Petition for Hearing was denied on January 24, 1952.

2. *Challenges to Constitutional Validity of Statutes Subsequent to Trial and Decisions Thereon.*

After his Demurrer and Motions to Set Aside and to Strike were denied by the trial court and his Petition for Prohibition was denied by the District Court of Appeal and by the Supreme Court, appellant was tried before a jury,

which rendered a verdict on February 5, 1952 of guilty on Count 1 and not guilty on Counts 2 and 3. Appellant immediately filed his Motion in Arrest of Judgment in which he challenged the constitutional validity of the aforesaid statutes in the following manner.

"Olin E. Darby, Defendant herein, hereby moves the Court to arrest judgment herein and to render no judgment on the verdict of the jury on Count One of the indictment herein, for the following reasons:

"That Sections 1090 and 1097 of the California Government Code and Section 1011 of the Education Code, for violation of which the jury has returned a verdict of guilty against defendant, is in deprivation and derogation of rights guaranteed to defendant by the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 13, of the Constitution of the State of California, and confer no jurisdiction upon this Court to render a judgment of guilty against defendant, in that the terms, language and provisions thereof are so ambiguous, uncertain, undefined and indefinite, as to apply equally to innocence as to guilt.

". . . in that by the language, wording and provisions thereof said statutes would impose a criminal penalty upon a member of the governing body of a school district on a contract made by the other members of such board, of which the interested member might have no knowledge and regarding which he might have performed no act of commission or omission.

". . . in that the language, wording, terms and provisions thereof set up an inescapable trap for a member of a board from which he has no means of extricating himself from criminal liability, since by the language thereof guilt would attach even though the interested member was absent and did not know or have any way of knowing of the

contemplated contract, or, knowing of the same, he could not avoid criminal liability by disqualifying or purposely absenting himself from the board at the time the remaining members thereof acted on a contract in which he might have an interest.

". . . in that the terms and provisions thereof fail to establish ascertainable standards of conduct for the guidance of persons of common intelligence and ordinary prudence in the conduct of their affairs.

". . . in that by the terms and provisions thereof said statutes purport to make a crime out of a legitimate and innocent business relationship solely as the result of the acts and conduct of others without the knowledge or complicity of the person purportedly liable.

". . . in that by the terms, language and provisions thereof the act of a governing body of a school district in performing its lawful duty as imposed by Section 18051 of the Education Code in awarding a contract to the lowest responsible bidder would convert a legitimate and innocent business relationship of a member thereof into a crime.

". . . in that the language, terms and provisions thereof apply equally to innocence as to guilt."

The Motion in Arrest of Judgment was denied on February 25, 1952.

3. *Challenges to Constitutional Validity of Statutes in California Appellate Courts and Decisions Thereon*

Appellant challenged the constitutional validity of Education Code Section 1011 and Government Code Sections 1090 and 1097 in his Opening Brief on appeal to the District Court of Appeal as follows:

> "Section 1097 of the Government Code, if annexed to Section 1011 of the Education Code to constitute a

statement of a crime, fails to comply with elements requisite to a penal statute as defined by general law and as guaranteed by the due process clauses of the Fourteenth Amendment to the Constitution of the United States, and Section 13, Article I of the Constitution of California. This is also true of Section 1090 of the Government Code . . ." (App. Op. Br. p. 37).

"A criminal statute which purports to render one punishable for the unsolicited acts of others in which he had no complicity cannot stand against the constitutional guarantees of the State and the United States" (App. Op. Br. p. 39).

"Statutes which create such a dilemma as to convert the performance of lawful duty into a crime are in deprivation of rights guaranteed by the Constitution of the United States and of California" (App. Op. Br. p. 41).

"Such statutes, purporting to constitute statements of crimes, do not meet the most meager standards of certainty required by the due process clauses of our constitutions as to what conduct is prohibited and by what persons" (App. Op. Br. p. 44)

". . . it can only be concluded that the instant statutes purporting to constitute a statement of a crime, are void and unconstitutional in violation of the due process guarantees of the Constitutions of the United States and of the State of California, in that they would convert an innocent and lawful interest into a crime without any act or volitional conduct at all by the possessor of the interest, and in that they fail to establish an ascertainable standard as to the interests and officials to which they apply" (App. Op. Br. p. 46).

The District Court of Appeal affirmed the judgment of the trial court in an opinion filed November 26, 1952. The opinion is attached hereto and marked Appendix I. The opinion demonstrates clearly that the constitutionality of Sections 1090 and 1097 of the Government Code of the State of California (Stats. 1943, C. 134, p. 896) and Section 1011

of the Education Code (Stats. 1943, C. 71, p. 310) was challenged by appellant upon the ground that said statutes are violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States, that said statutes were upheld by the District Court as not being repugnant to said provision of the Federal Constitution, and that such finding of constitutional validity was necessary in order to sustain the conviction of appellant under the statutes.

The District Court discussed the constitutional validity of the challenged statutes at length under its own heading entitled, "Sections 1011 of the Education Code and 1090 and 1097 of the Government Code Are Constitutional" (Appendix I, p. 43)

The Court discussed each of appellant's contentions that the statutes are unconstitutional, referring specifically to appellant's arguments. The manner in which this was done, with pertinent quotations from the opinion, appears below.

Appellant contended that the challenged statutes condemn a board member for the act of third parties over which he has no control and of which he might well have no knowledge, in violation of the due process clause of the Fourteenth Amendment. The District Court's opinion on this point was that the "guilty act" of the accused was the "possession of an interest" or alternately, the "creation of a situation" whereby the accused "becomes interested" in a public contract. The Court's definition of the "guilty act" appears as follows:

"He is not being punished for the acts of others . . . the act which creates the public offense is the defendant's creation of a situation whereby he becomes interested in a public contract while he is a member of the board" (Appendix I, p. 45).

Appellant's point that the statutes unconstitutionally rendered a board member guilty for acts of others over which he exercised no control was covered by the decision as follows (Appendix I, p. 46):

> ". . . to say that appellant had no control over the action of the board is to ignore a basic presumption, to wit, that members of the board who are disinterested in a contract will do their duty, and refrain from voting to award a contract in which another member is interested."

On appellant's contention that the challenged statutes omit the essential elements of a crime, an act of omission or commission coupled with a guilty intent, in violation of the due process clause of the Fourteenth Amendment to the Constitution, the decision below reached the following conclusions and definitions of the guilty act and intent:

> (1) ". . . the *act* which creates the public offense is the defendant's creation of a situation whereby he becomes interested in a public contract while he is a member of the board" (Appendix I, p. 45).
>
> ". . . the act denounced is the 'possession of an interest' " (Appendix I, p. 43).
>
> "A member is forbidden to enter into any business relation or arrangement with a person that will tend to cause the member to favor such person . . ." (Appendix I, p. 44).
>
> (2) "Appellant attacks sections 1090 and 1097 as invalid in that they do not require a specific criminal intent. The absence of such requirement does not apply to crimes based on public policy. To save the state from certain acts universally deemed to be inimical to the public welfare, it is sufficient if the act is forbidden and a penalty is prescribed for its violation. The intent is imputed" (Appendix I, p. 46).

Appellant's point that the statutes as statements of a crime are unconstitutional in that no criminal penalty was

provided for a prohibited interest of a school trustee, the sole and exclusive remedy being to declare such contracts void (*Education Code*, Section 1013), was stated by the District Court of Appeal as follows:

> "Appellant concludes . . . that the only remedy applicable to a school trustee who votes on a contract in which he has an interest is civil (sec. 1013) and that since no punishment is annexed, the interest prohibited by section 1011 may be illegal, but it can be no crime because a penalty is necessary to constitute a crime" (Appendix I, p. 39 and 40).

On this point the decision below was,

> ". . . it has been the constant policy of this state from the beginning to make it a crime for an officer to make a contract on behalf of a public agency while he is interested in the subject matter of the contract" (Appendix I, p. 43)

Appellant's final contention was that the statutes defining a mere "interest" as a crime are too vague, uncertain and indefinite, and fail to establish a reasonably ascertainable standard of conduct, in violation of statutory standards required by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

To this contention the District Court held the challenged language to be sufficiently certain and definite to fulfill the requirements of said provision of the Constitution, stating,

> "Inasmuch as the language employed in the statutes under attack is clear and the words are such as a person of average intelligence can understand, it must be held that there is no want of certainty or definiteness in them" (Appendix I, p. 47).

Appellant again challenged the constitutional validity of the aforementioned statutes in his Petition for Hearing in the Supreme Court of the State of California, as follows:

"The Court Below Erred in Upholding the Constitutionality of Section 1011 of the Education Code as a Penal Statute (and Sections 1090 and 1097 of the Government Code, If They Be held Applicable to Appellant) in That It Invalidly Converts a Lawful Status of Private Ownership Into a Crime Solely as a result of the Lawful Act of a Board, With No Act of Commission or Omission by Such Owner."

"Section 1011 of the Education Code (and Sec. 1090 of the Government Code, if applicable), if construed to be a crime by annexation thereto of the criminal penalty imposed by Section 1097 of the Government Code, does violence to constitutional guarantees imposed by the due process clause of the Constitution of the United States, Amendment XIV, and Section 13, Article I of the Constitution of California. . . . As the statement of a crime, for which the Government Code can be construed to annex a penalty, it violates prerequisite standards guaranteed by the constitutions" (Petition for Hearing, p. 32).

Hearing was denied by the Supreme Court of the State of California on December 23, 1952.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the statutory provisions set forth in Section I of this Statement of Jurisdiction.

VI

Grounds upon Which It Is Contended the Questions Involved Are Substantial

The indictment and conviction of a member of the Board of Education for violation of statutes which purport to define a crime but which fail to establish an ascertainable standard of conduct and which make him criminally liable for an act of the Board of which he may or may not have

knowledge and in which he may or may not participate, involves substantial constitutional questions.

The public schools of California are governed and administered by local boards comprising laymen of the community who serve on such boards in a voluntary capacity. There are over one thousand school districts in the state, each governed by such a board. They function under special school laws enacted by the Legislature and incorporated in a separate body of law entitled the Education Code.

This Code prohibits school board members from being interested in the board's contracts and renders such contracts void. (*Education Code*, Sections 1011, 1013). No criminal penalty is prescribed. The Government Code, applying to "members of the Legislature and state, county, city and judicial district officers" has a similar interest prohibition (Section 1090), for which a criminal penalty is assessed. Section 1097.

This criminal penalty, enacted by California's first Legislature (Act of May 9, 1851) to apply to the public officials specified in the Act, *supra*, has never heretofore been applied to a member of a school board, for which as said the Legislature enacted a special statute with its own remedy, *supra*.

The constitutional validity of the statutes challenged in this case is of great importance to the public. If the decision upholding these statutes as constitutional is allowed to stand no person possessing any property interests could safely serve on a Board of Education, since such position would place him in constant jeopardy. By the decision's definition of guilty interest, he would be made criminally liable for the act of the Board in making a contract in any manner remotely connected with any interest he might possess, and his guilt would not depend on whether he had any

knowledge of the contract or whether he participated in its award.

Such criminal jeopardy on statutes devoid of constitutional protections is detrimental to the public welfare in a very real way. Persons who have the capabilities and experience to discharge the heavy responsibility of governing the public schools could not afford to serve because of the exposure to a criminal penalty through no act or knowledge of their own. Thus, the public would be forced to rely on persons with no proprietary interests to regulate its school systems. Such would be the only persons who could serve without fear of a criminal indictment. Obviously, such a condition would be deplorable and detrimental to the public welfare.

The substantial Federal questions which have been properly raised in this case and which have been ruled upon adversely to appellant by the trial and highest appellate courts of the State of California, are the following:

1. Do Section 1011 of the Education Code and Sections 1090 and 1097 of the Government Code of the State of California deprive persons of liberty without due process of law by converting the ownership by a member of the Board of Education of a lawful business interest into a crime without requiring any act, complicity or knowledge of the guilty member but solely as a result of the lawful act of a third party (the Board of Education) in violation of the guarantees contained in the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does the construction of the instant statutes by the highest court of California that "possession of an interest" constitutes a violation thereof without the requisites of guilty act, complicity, or knowledge, render the statutes repugnant to the due process clause of the Fourteenth Amendment?

3. Do the interest statutes of which appellant was convicted contain the prerequisites to a valid statement of a public offense required by the due process clause of the Fourteenth Amendment?

4. Do Section 1011 of the Education Code and Sections 1090 and 1097 of the Government Code of the State of California deprive persons of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by defining interest in a contract as a crime in terms so vague, indefinite and uncertain that no ascertainable standard of conduct is established thereby?

These are real and substantial constitutional questions of great public importance arising out of a bitterly contested case; they are neither frivolous, abstract nor formal.

The decision upholding the constitutional validity of these statutes was determinative of the decision of the highest court of California. Appellant's conviction under the statutes could not have been sustained without sustaining the constitutionality of the challenged statutes. Without the decisions overruling appellant's successive challenges in the trial and highest appellate courts to the constitutional validity of the statutes, the grand jury would have been without jurisdiction to indict appellant and the Superior Court would have been without jurisdiction to try him. An unconstitutional law is void and is not law; a conviction thereunder is not merely erroneous but is illegal and void. *In Re Siebold*, 100 U. S. 371, *Ex Parte Royall*, 117 U. S. 241.

As stated in *Starin* v. *New York City*, 115 U. S. 248:

> "The character of a case is determined by the questions involved. If, from the questions, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will

be one arising under the Constitution or laws of the United States . . ."

VII

The Challenged Statutes Are Unconstitutional

A. THE CALIFORNIA INTEREST STATUTES ON THEIR FACE FAIL TO STATE THE NECESSARY ELEMENTS OF A PUBLIC OFFENSE REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT THEY PURPORT TO CONVERT AN INNOCENT BUSINESSS INTEREST OF A MEMBER OF A SCHOOL BOARD INTO A CRIME WITHOUT EITHER GUILTY ACT OR GUILTY KNOWLEDGE BUT SOLELY AS A RESULT OF THE ACTS OF THIRD PARTIES.

"Observe that the section forbids no specific or definite act." *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 85.

Section 1011 of the Education Code of California states that no member of a school board "shall be interested in any contract made by the board" (Government Code Section 1090 has similar language applicable to other officials). No act of commission or omission of the member is condemned by the statute. It condemns him for an act of the board. A single board member could not award a contract if he would. He may or may not participate; he may or may not have knowledge of the contract. School contracts are awarded by majority vote. In any case the act of the board is one over which no member has any control since, as it did in this case, the board must award the contract to the lowest bidder (*Education Code*, Sec. 18051). It has no alternative; any other contract would be void (*Reams* v. *Cooley*, 171 Cal. 150).

The only penalty assessed by the California Legislature for violation of Section 1011 of the Education Code is that a contract so made shall be void (Sec. 1013), and that is the only penalty heretofore applied. *Escondido Lumber Co.* v. *Baldwin*, 2 Cal. App. 606. As civil grounds for voiding a contract the statute may be valid. As the statement of a

crime, for which Government Code Section 1097 has now been construed by the Court below to annex a severe criminal penalty, the statute falls short of elements required by the due process clause of the Fourteenth Amendment, in that it lacks both the requisites of a guilty act and a guilty intent.

The Court below recognized that a criminal statute to be valid must provide that some act of the accused violate the statute. It states, "there can be no crime, in the absence of a statute requiring an act or forbidding an omission." *Penal Code of California*, Section 15. This act must combine with an intent. "There must exist a union, or joint operation, of act and intent." *Penal Code*, Section 20. A criminal statute, like the interest statute in the instant case, which purports to render one punishable not for any act committed by him but for the unsolicited acts of others in which he had no complicity lacks elementary prerequisites for criminal enactments imposed upon state legislatures by the due process clause of the Fourteenth Amendment.

United States v. *Cohen*, 255 U. S. 81.

That the statute lacks the essential element of an act of omission or commission by the person sought to be charged is apparent on its face. The only reference to him is that he shall not "be interested." This can only refer to a status, that of possessing an interest. Such status includes no act. Neither can a guilty intent be imputed to such status. The interest might have been acquired at birth, by inheritance, or by many means long before the member joined the board.

The only act referred to in the statute is one "made by the board." The board member could do no act to convert his lawful interest into a crime. Nothing could change that interest, on the face of the statute, into a crime except an act of the board in awarding a contract to a concern in which the member possessed a pre-existing interest.

The board member's interest was not a crime before the board acted. Neither is the board's act a crime. Yet by the statute on its face, now construed by California's highest court to be a crime, this lawful act of the board converts a lawful, preexisting interest of one of its members into a crime. Absent are the elements of an act of commission or omission coupled with guilty intent required by the due process clause of the Fourteenth Amendment. No such act, complicity or even knowledge of the board member is a requsite to the offense, either on its face or as construed by the Court below.

Thus, there can be little doubt what "act" brings the statute into effect, i.e., the act of the board in awarding a contract. This is even recognized by the Court below, where it states, ". . . when the board authorizes the contract, such member violates Sections 1090 and 1097" (Appendix I, p. 44) The corpus delicti is the making of a contract. The interested member may have been absent, he may have been sick, he may have had no knowledge of the proposed contract, or he may have had knowledge and tried to disqualify himself. However, since it is the board's act which consummates the crime, no act of his is required. By the very language of the statute, only the act of the board is necessary to make the member guilty.

Such a statute is repugnant to the due process clause of the Fourteenth Amendment. As was long ago stated by this Court, *United States* v. *Fox*, 95 U. S. 670, 671:

> "Upon principle, an act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretences is made an offense against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will,

> by the agency of another. The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction."

This fatal deficiency of the statutes in the requisite constitutional elements of guilty act and guilty intent was brought to the attention of the court below. The decision undertakes in various ways to construe the statute to include some act on the part of the accused and to impute some guilty intent to him.

For instance, at one place the court below asserts, ". . . the act denounced is the 'possession of an interest' " (Appendix I, p. 43). To state it is to reveal its fallacy. "Possession of an interest" is neither an act nor a crime. Nor does the statute under consideration purport to make it so. Even under the construction by the court below, possession only becomes a crime if and when the board makes a contract involving the interest.

Further undertaking to read a guilty "act" into the statute the decision below states, "It means that a member is forbidden to enter into any business relation or arrangement with a person that will tend to cause the member to favor such person when any contract with the school district proposed by such person shall be presented for the board's approval." (Appendix I, p. 44). By this definition of the criminal "act", it is conditioned on the subsequent conduct of two other parties. It would only become criminal if the other party to the relation subsequently proposed a contract to the board, and even then another act of other persons would be required to make it a crime. The board must award the contract.

Furthering this construction of the statute to supply the requisite criminal act, the decision states, "There is no compulsion for a man to become a board member, and when he

does so, he is not obliged to make alliances with others who plan to engage in a transaction with the board" (Appendix I, p. 44). We are not dealing with a conspiracy statute. The act of entering business relations or "alliances" with another person, no matter what the mental state as to whether it would "tend to cause the member to favor such person", is not a guilty act. Entering into a business relation is an innocent act, which cannot subsequently be converted into a guilty act by the conduct of another person in proposing a contract, or the board's act in awarding it. (*United States* v. *Fox*, 95 U. S. 670, *supra*).

As to when the statute attaches criminal liability to a board member, the court below states that the board member "has an interest the moment he places himself in a situation 'where his personal interest will conflict with the faithful performance of his duty as trustee' ". (Appendix I, p. 45). If "placing himself in a situation" is the guilty act, appellant could have been indicted after he signed the lease for his premises in June of 1949. That is the only act conceivably committed by him in which "he placed himself in a situation." However, the leasing of a store is not a criminal act. Again, the subsequent act of the board in awarding a contract could not convert a prior innocent act into a crime.

Again the decision states, "the act which creates the public offense is the defendant's creation of a stituation whereby he becomes interested in a public contract while he is a member of the board." (Appendix I, p. 45). This definition would change the statute. By it, the guilty act is one of the "becoming" interested in an existing public contract. This is not what the statute says. The interests referred to by the statute must be in existence at the time the contract is awarded. (*Escondido Lumber Co.* v. *Baldwin*, 2 Cal. App. 606; *Martin Bros.* v. *Concord*, 110 Cal. App. 2d

215; *Oakland* v. *California Const. Co.*, 15 Cal. 2d 573; *People* v. *Deysher*, 2 Cal. 2d 141).

The decision below proceeds to read still another guilty "act" into the statute, the act of "continuing" an interest in a previously awarded contract after knowledge thereof. This is stated as follows, "The interest comes under the ban of section 1090 whether the member brings about the situation or continues to be interested after knowledge of its existence."(Appendix I, p. 45). By this construction of the statute, the interest itself is innocent when the contract is made, and does not even become a crime when knowledge is acquired. The criminal "act" thus construed is that after acquiring knowledge, the board member "continues to be interested." What ascertainable standard of conduct does this construction of the statute impose upon the board member? By it, the crime would consist in not selling his property after acquiring knowledge that it vested in him an interest in a school contract? When is this crime committed? Would he be indictable immediately or would he be given a waiting period to divest himself of his property before his "act" of continuing an interest would be punishable? This interpretation of the statute multiplies its uncertainties.

These vain efforts to read a guilty act into the language of the statute reveal more forcibly than could any language of this appellant that none exists. They emphasize with force the proposition here presented to this Court: the statute condems no act of the member, but is made operative only by the act of the board. By authorities already cited, the Fourteenth Amendment does not permit a statute to convert an innocent interest into a crime retroactively by the subsequent act of third parties.

The statute so construed opens wide the flood gates of political persecution by making guilt depend not upon any

guilty act but upon the public official's mental state. For instance, this language is found in the decision, ". . . if the member is for any reason placed in such position that he prefers the execution of a proposed contract more than he desires the public good to be served then he is interested . . . " (Appendix I, p. 44). This definition of guilty interests not only requires no act by the member, but does not even require that a contract be made.

That a statute which fails to define in clear terms the act of the accused which it condemns fails to meet the standards required by the Fourteenth Amendment, has been reiterated by this Court many times, as in *Lanzetta* v. *New Jersey*, 307 U. S. 452:

> "The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

B. THE CALIFORNIA INTEREST STATUTES ON THEIR FACE AND AS CONSTRUED BY THE COURT BELOW FALL SHORT OF MINIMUM STANDARDS IMPOSED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY FAILING TO DEFINE A CRIME IN LANGUAGE SUFFICIENTLY DEFINITE TO PRESCRIBE A REASONABLY ASCERTAINABLE STANDARD OF CONDUCT.

The interest statute applicable to appellant states that no member of a school board "shall be interested in any contract made by the board." Section 1011, *Education Code*. A contract in violation of this statute is declared to be void. Section 1013, *Education Code*. No criminal penalty is assessed, but the court below has construed Section 1097 of the Government Code, which assesses a criminal penalty for interests prohibited to officials enumerated in Section 1090 of that Code, to supply a criminal penalty for violation of the Education Code.

Appellant has undertaken in the previous section to point out that these statutes as a statement of a public offense are fatally defective because they condemn no act of the interested member but on their face require the act of the board to consummate the crime, with or without the member's knowledge or participation; that thus the statute lacks the constitutional prerequisites of both act and intent.

Appellant will now undertake to demonstrate that as statements of a public offense these interest statutes on their face lack the requisite of certainty necessary to establish an ascertainable standard of conduct for the guidance of reasonable men, and that the decision below has removed such certainties as had previously been written into the statute by judicial interpretation in civil actions. As succinctly stated by this Court in *Winters* v. *New York*, 333 U. S. 507, 515:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness. There must be ascertainable standards of guilt."

Addressing itself to this argument of appellant, the court below states, "No reasonably intelligent person can fail to understand the meaning of 'interest' or the significance of 'contract'. Both are of frequent use in the market place as well as in the counting house" (Appendix I, p. 47).

By such statement the court could only have reference to accepted definitions such as that of the participle "interested", "Having a possessory interest; being part owner; as one interested in railroad shares", or the noun "interest": "That which is of advantage or profit; participation in profit" (*Funk & Wagnall's Unabridged Dictionary*). The *Oxford English Dictionary* gives many definitions of interest, such as "Right or title to share in some-

thing; share, part. Esp. a pecuniary share or stake in, or claim upon anything; the relation of being a part owner of property, a shareholder or bond holder in a commercial or financial undertaking or the like."

But the court below rules these commonly accepted definitions out of the statute. It says, "For a school trustee to have an 'interest' in a contract he is not required to share directly in the profits to be realized" (Appendix I, p. 45). This leaves the reasonable man in the dark. Definitions understood by him do not apply.

Not only does the statute as so construed fail to employ the term interest within its commonly accepted meaning but it also fails to use the term within the meaning it has been given by many prior civil decisions.

A long line of cases in California and other states had defined a prohibited interest as "any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment which may be rendered." *Meyer* v. *City of San Diego*, 121 Cal. 102, 109. *Goodspeed* v. *Great Western Power Co.*, 19 Cal. App. 2d 438, 444, defined prohibited interest as "direct, proximate, inherent in the instant event . . . It means a definite, material financial stake . . ." *Cuyamaca Water Co.* v. *Superior Court*, 193 Cal. 584, 586-587, established the test of interest as whether "a liability or pecuniary gain must occur in the event of suit." This test was adopted from English law in *Smedley* v. *Kirby*, 120 Mich. 253. An Illinois court stated in *Panozzo* v. *City of Rockford*, 307 Ill. App. 443, 28 N. E. 748, 754, that it found no cases under any other rule than that the prohibitive interest must be "pecuniary."

Many civil cases under the instant statutes adhered to the "gain or lose" test: That to be interested in a contract an officer must have a right to participate in benefits or obligation to suffer detriments flowing therefrom. (*Martin*

Bros. v. *City of Concord*, 110 Cal. App. 2d 215; *People* v. *Becker*, 112 Cal. App. 2d 324; *Escondido Lumber Co.* v. *Baldwin*, 2 Cal. App. 606; *Berka* v. *Woodward*, 125 Cal. 119; *Kennedy* v. *City of Gustine*, 199 Cal. 251; *Osburn* v. *Stone*, 170 Cal. 480; *Moody* v. *Shuffleton*, 203 Cal. 100.)

These interest statutes as now construed in a criminal case shatter all of these carefully defined and fixed tests of prohibitive interest applied in civil cases. The statute, says the Court below, "does not signify that a member of the board of education is merely inhibited from sharing directly in the profits or advantages to be derived from a contract made by the board in its official capacity" (Appendix I, p. 43-44).

This decision below removes any limits to the meaning of "interest" as used in the statute. It was never contended, at trial or on appeal, that appellant stood to gain or lose on the school's ice cream contract or that he had any right to participate in its benefits or that he could suffer any detriments from it. Likewise it was not contended that he was an employee of or owed any loyalty to the ice cream contractor. The interest, if any there be, would have to be much more remote and contingent, in fact would have to be a mental interest, to render appellant subject to the statute. The interest statutes are now given such latitude as to include such mental or remote interest. The decision below, referring to the interest statutes, says, "It is more than possible than an interest may be contingent or remote and yet influence the member's judgment or vote" (Appendix I, p. 55).

With this conclusion, the Court approved an instruction by the trial court that guilty interest "may be direct or indirect and includes any monetary or proprietary benefits, or gain of any sort, or the contingent possibility of pecuniary benefits" (Clk. Tr. 154). How remote such interest

can be is further contained in this instruction, where it reads that a felonious interest in a contract exists if the contractor "is in a position to render actual or potential pecuniary benefit to the board number (member) based on the contract the business firm has received." This makes the interest depend on the contractor's "position" to render benefits.

Heretofore, decisions had been unanimous in civil cases that a "remote, contingent, and speculative" interest was not subject to the statute. *Cuyamaca* v. *Superior Court*, 193 Cal. 584, 586-587.

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness (Citing cases). There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment (Citing cases). The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. Ed. 888, or in regard to the applicable tests to ascertain guilt (Citing cases)."
>
> *Winters* v. *New York*, 333 U. S. 507, 515.

Moreover, the decision below reduces the test of prohibited interest to the mental state of the board member. It states that "any business relation or arrangement with a person that will tend to cause the member to favor such person" constitutes a prohibited interest (Appendix I, p. 44).

An even more subjective test of criminal liability is applied by the decision where it states, ". . . if the member is for any reason placed in such position that he prefers the execution of a proposed contract more than he desires the public good to be served then he is interested . . ." (Appendix I, p. 44).

At another point the decision defines the statute on criminal interest to apply if the board member "continues to be interested after knowledge" of his situation (Appendix I, p. 45).

If the interest statutes were not too uncertain on their face to measure up to the minimum standards of the due process clause, the construction now given them by California's highest court would render them so.

A statute defining a crime in language susceptible of such variegated interpretation and unlimited application falls short of prerequisite standards of certitude demanded by the due process clause of the Fourteenth Amendment.

As is stated in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . ."

The necessity of reducing the broad and uncertain term "interest" to certainty is illustrated by contrast with the Federal statute on the subject.

> "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined . . ."
>
> Title 18, U. S. C. A., Sec. 434 (Act of June 25, 1948, c. 645, 62 Stat. 703).

This statute, in contrast to the California statutes, defines the crime as interest "in the pecuniary profits or contracts" and in addition requires for guilt that the officer "is employed or acts . . . with such business entity."

Neither such exactness in definition of the term "interest" nor in proscribing an act in relation thereto can be found or read into the California statutes.

As stated in *United States* v. *Reese*, 92 U. S 214:

> "If the legislature undertakes to define a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind: Every man should be able to know with certainty when he is committing a crime . . . It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and see who could be rightfully detained and who should be set at large."

The decision below points the way out to members of California's school boards, where it says (Appendix I, p. 45), ". . . if by chance he discovers he is interested prior to official action he should divest himself of such interest . . ." What ascertainable standard of conduct does this prescribe? How can a board member anticipate what corporation in which he owns stock, or what tenant of his, might come before the board with a bid? Indeed, it would be "by chance", as the court states. Conduct dependent upon a chance discovery can hardly constitute a constitutionally valid criminal statute.

When confronted with a bid from such a corporation or lessee, what conduct would the statute require? That a board member sell his property before the contract was considered? This he must do, the decision states.

The only alternative is to "avoid criminal liability by resigning from his office." This presents the final meaning of the statute to a citizen who might be willing to serve his community by the thankless and payless job of serving on

a school board. As some very distinguished citizens have discovered, a property owner cannot risk degradation by serving as a member of a Board of Education. If the constitutionality of these statutes is upheld as construed by the Court below, parents and taxpayers will have to rely on indigents to govern their school systems.

Conclusion

Appellant respectfully submits that this Court has jurisdiction to hear this appeal.

BATES BOOTH AND GERTRUDE GREENGARD,
By BATES BOOTH,
Counsel for Appellant.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

Crim No. 4839

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

OLIN E. DARBY,
Defendant and Appellant

Appeal from the Superior Court Los Angeles County, Charles W. Fricke, Judge

Bates Booth and Joseph Scott for Appellant.

Edmund G. Brown, Attorney General; Dan Kaufmann, Deputy Attorney General; S. Ernest Roll, District Attorney; Mark Brandler, Deputy District Attorney, for Respondent.

While he was a member of the Los Angeles Board of Education appellant was indicted on three counts, each accusing him of having an unlawful interest in a contract executed by the board. Count I alleged a contract between the board and the Jack & Jill Ice Cream Company, a partnership herein referred to as Jack & Jill, and that it was contrary to the provisions of section 1011 of the Education Code and section 1090 of the Government Code. He was convicted on count I but acquitted on counts II and III which alleged kindred charges with respect to certain printing contracts. Proceedings were suspended and appellant was granted probation on condition that he pay a fine of $1,000. He appealed from the judgment, the order denying his motion for a new trial, the intermediate orders made by the judge, the order denying appellant's motion in arrest of judgment, and the verdict. Since the several orders and the verdict are nonappealable, the appeals therefrom will be dismissed and the various attacks upon the verdict will be considered along

with the judgment and the motion for a new trial. (*People* v. *D'Elia*, 73 Cal. App. 2d 764, 766; Penal Code, sec. 1237.)

The Background

Appellant's appointment to membership on the Los Angeles Board of Education was on May 27, 1947. He was president of the board for the school year July 1, 1948 to June 30, 1949. He was elected to succeed himself for the four-year term commencing July 1, 1951. However, he had not arrived at a general election before the commencement of the series of events recited herein.

In 1949 appellant was owner of a vacant store on Third street in Los Angeles. In June he telephoned the office of David Bresler, member of the firm of Jack & Jill. When Bresler returned the call, appellant informed him of his vacant store and commended it as a good location for commencing an ice cream business. Bresler sent Mr. Olin, general manager of Jack & Jill to inspect the store. Late in June, 1949, Mr. Olin introduced Bresler to appellant at the board's office as a partner in Jack & Jill. Appellant followed the introduction with an inquiry whether Bresler would be interested in bidding on school ice cream business. Indeed, he would, if there was a chance. Appellant could help him get it if Jack & Jill were the low bidder. Appellant thereupon injected into the discussion the leasing of his vacant store and quoted a rental of $300 monthly and suggested his earnest desire to procure a good tenant.

Arrangements were completed for appellant to draw the lease on the Third street property by inserting as lessee the name of one Wass, an employee of Jack & Jill. Bresler would send appellant a check for $600 dated June 24, 1949, in payment of the first and last months of the lease term. On receipt of the lease signed by appellant, Bresler had Wass to execute it. Appellant received the executed lease and the $600 check. The $300 was received monthly by appellant until February, 1950. The premises were used as a retail dispensary of the products of Jack & Jill whose name was on the outside.

On Juy 1, 1949, appellant was by president Elliott duly appointed chairman of the Insurance Committee. He promptly called Elliott's attention to his former request to

be appointed chairman of the Purchasing and Distribution Committee, herein referred to as the Purchasing Committee. Thereupon the president withdrew his appointment of Earle D. Baker from the coveted chairmanship, appointed him to the Insurance Committee, and named appellant as chairman of the Purchasing Committee. Among the duties of the latter committee is that of receiving the tabulation sheet containing a summary of ice cream bids, the names of bidders and other items on which they have bid and the prices of the bidders. On receipt of such summaries, the purchasing committee forwards its recommendations to the Board which accordingly makes the awards of contracts. The purchasing committee convened on August 4, 1949, to consider the bids on ice cream contracts. They found Jack & Jill had made the low bid and that it had already been agreed to by all other bidders. By reason of the committee's inability to find one bidder alone capable of supplying the total output required, the committee decided to allocate the business among all the bidders. There followed a discussion among the members as to whether Jack & Jill, a newcomer to Los Angeles and relatively unknown, should be given more than a token award. Appellant took the position that since Jack & Jill had put in the low bid which had been met by all the other bidders, they should have more than a token amount and suggested they be given twenty per cent, or about $90,000 a year. Appellant's proposal was adopted by the purchasing committee whereupon he signed the committee's report dated August 22, 1949, recommending the purchase of ice cream from various bidders including Jack & Jill for the year following September 1, 1949. Thus Jack & Jill received twenty per cent of the gross ice cream sales to the board for the year which paid them $68,250.18.

While some evidence was adduced that the fair monthly rental value of the Third street store in July, 1949, was $300, other proof showed it did not exceed one-half that sum. An expert witness testified that it was worth less than $300 per month. While appellant received checks for $300 each month in payment of his lease, Blagg and Bresler, the lessees of Jack & Jill, paid the latter only $125 per month for a portion of the lease term, thereby requiring Jack & Jill to absorb the differential. In February, 1950, appellant

offered to lease the store to Blagg at $125 a month. Another witness testified that the successor of Blagg and Bresler obtained a lease at $250 rental monthly, and that appellant consented to reduce it to $175.

Appellant did not testify.

However, on this appeal, he submits that the proof is insufficient and the law is not adequate to warrant appellant's conviction for violating section 1011 of the Education Code and sections 1090 and 1097 of the Government Code in that he was "interested as a member of the Board of Education . . . in a contract for the purchase of ice cream products made by the said Board. . ."

The Indictment and the Statutes

Appellant was accused by indictment of "wilfully and knowingly being interested as a member of the Board of Education in a contract for the purchase of ice cream products made by the said Board" with Jack & Jill, all in violation of sections 1090 and 1097 of the Government Code [1] and section 1011 of the Education Code. [2]

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1 *Government Code*

Section 1090: "Members of the legislature, state, county, judicial district and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Section 1091: "State, county, judicial district and city officers shall not be purchasers at any sale nor vendors at any purchase made by them in their official capacity."

Section 1092: "Every contract made in violation of any of the provisions of Sections 1090 and 1091 may be avoided at the instance of any party except the officer interested therein."

Section 1097: "Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the State prison for not more than five years, and is forever disqualified from holding any office in this State.

2 *Education Code*

Section 1011: "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

Appellant contends that the Education Code pre-empts the field of interests prohibited to school boards; that schoolboard members are not subject to the parallel article of the Government Code; that each unit of legislation is complete within itself and does not overlap; that if the Legislature had intended the Government Code to apply to school boards, the provisions of the Education Code would be meaningless; that the specific controls the general. Appellant contends that the framing of the accusation against him under section 1090, Government Code, is a distortion of that statute; that inasmuch as the Legislature has adopted an Education Code and included in it section 1011 specially designed to inhibit a school-board member from having an interest in a contract made by the board—having the prohibited interest may be illegal, but not a crime. The feature of section 1014 which appeals with emphasis to appellant is that it makes the act of which he stands accused a misdemeanor. Because of this clear provision applicable to school trustees, appellant contends that the court below erroneously instructed the jury that a violation of section 1011, Education Code, is a felony under section 1097 of the Government Code, and that because the lawmaker "set out the consequences of a disobedience to his will, no other consequences can be logically and fairly considered as coming within the scope of his intention." (*Bird* v. *Dennison*, 7 Cal. 297, 307.) Appellant concludes from the quoted decision and statutory provisions that the only remedy applicable to a school trustee who votes on a contract in which he has an interest is civil, (sec. 1013) and that since no punishment is annexed, the interest prohibited by section 1011 may be illegal, but it can be no crime because a penalty is necessary

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Section 1013: "Any contract made in violation of Sections 1011 or 1012 is void."

Section 1014: "The offering of any valuable thing to any member of the governing board of any school district, with the intent to influence his action in regard to the granting of any teacher's certificate, the appointment of any teacher, superintendent, or other officer or employee, the adoption of any textbook, or the making of any contract to which the board of which he is a member is a party, or the acceptance by any member of the governing board of any valuable thing, with corrupt intent, is a misdemeanor."

to constitute a crime. (Penal Code, sec. 15.) From the conclusion thus derived appellant generalizes that no felony conviction can be had for the violation of a section of the Education Code for which no penalty is provided.

It would be pleasing to decipher the codes as appellant's counsel has done. At first blush it might appear that, after the Legislature has solemnly enacted statutes for the governance of those who conduct the affairs of a school district and set them up in buckram as "Education Code," the law-enforcing agencies would forego consulting the Government Code, the Penal Code or any other code and apply only the remedies provided in the Education Code. But to reason so is to indulge in interpreting the codes with a squinted view. The laws have been codified for the convenience of the people. All of them combined speak for the sovereign power and all constitute but a single statute (In re Porterfield, 28 Cal. 2d 91, 100). There is no rule of statutory construction that requires the courts so to construe a statute as to render it invalid. The reverse is more nearly the rule.

It is true that Section 1097 applies to all public officers, but does not a school trustee come within that classification? To exclude him from the class of "all public officers" would be to defy the express mandate of the constitution (Art. 1, Secs. 11 and 21; Art. IV, Sec. 25). Those provisions require all laws of a general nature to have a uniform operation and forbid the Legislature to confer special privileges or immunities or to impose a less penalty on one class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the particular subject of the law (5 Cal. Jr., p. 797, Sec. 180). Indeed, why should a member of a school board with its immense constituency and wealth be exempt from the operation of the Government Code or the Penal Code after he has violated their inhibitions if a city councilman or a supervisor must be punished for voting on a contract in which he had an interest? He is a member of a "body or board" forbidden to have an interest (Sec. 1090) and he is a "person prohibited by the laws of this State from making or being interested in contracts" and has violated "provisions of such laws" (Section 1097). If the Legislature

had intended to restrict the application of 1097 to any particular group or class of officers, it could easily have done so by the use of simple words instead of saying "every officer or person . . . who violates any of the provisions of such laws . . ."

Appellant contends that the rule of *expressio unius* emphatically applies by reason of the absence of "school board member" or "school trustee" from those forbidden by Section 1090 to be interested. Such contention ignores the provisions of the Los Angeles City Charter which provides for the manner and times of electing board members, their terms of office, their number and qualifications, their compensation and removal. Pursuant to such power granted by the Constitution (Art. XI, Sec. 8½, subd. 2) the city provided for the board of trustees of the city school district and included them in the list of "City officers" (Stats. 1925, p. 1039, Art. II, Sec. 5, Los Angeles City Charter). While the school system is a matter of general concern and the members of a board are governed by state laws, yet with respect to their election, tenure and removal, they are municipal officers (Becker v. Council of the City of Albany, 47 Cal. App. 2d 702, 705) and therefore subject to Sections 1090 et seq. of the Code. Furthermore, members of the Los Angeles Board of Education are "state officers" referred to in Section 1090. The quoted phrase applies to all persons "clothed with functions affecting the public" which functions deraign from state laws (21 Cal. Jur., p. 829, Sec. 13). An officer is a state officer if the tasks performed by him are accomplished for and on behalf of the state "notwithstanding the fact that his duties were restricted to a particular geographical portion of the state" (Milliken v. Meyers, 25 Cal. App. 510, 514). The school district is a state agency and its board members are state officers (People v. Richards, 86 Cal. App. 86, 94.)

If the contention of appellant that officers not specified in Section 1090 are thereby excluded, all the trustees and directors of reclamation, flood control, swampland, sanitary and levee districts would have no law to nullify their contracts authorized by the vote of those having an interest. Upon no rational hypothesis could the Legislature have

intended that a trustee of any of such districts should be privileged to have an interest in a contract to be adopted by the district. Clearly then, such a trustee is either a state or county officer and as such is under the ban of Section 1090, and if guilty is punishable pursuant to Section 1097. If a trustee of any of the several classes of districts mentioned in the first sentence of this paragraph is amenable to the cited statutory provisions of the Government Code, then there is no reason why the trustee of a school district should not be likewise subject thereto, unless he may be excused by reason of the existence of the Education Code. But there is no inconsistency between the two codes. Merely because Section 1014 applies only to the "governing board" of a school district, its members are not thereby divested of their status as officers of the state. The Education Code, Section 1014, makes it a misdemeanor for a member with corrupt intent to accept a valuable thing from a bribe giver, whereas the Government Code makes it a crime for any "officer or person prohibited by the laws of this State" from being interested in contracts adopted by his governing body. The two codes are not antagonistic laws, but both are parts of the State's jurisprudence and must be harmonized and effect given to every section (See People v. Seeley, 137 Cal. 13, 15). What the Legislature says is the law, wheresoever it be found. If Section 1014 should be declared a specific statue applicable only to trustees of a school district, then it would necessarily at the same time be held invalid as subjecting them to a less penalty than must be applied to other public officers for the same offense (See Ventura County Harbor District v. Board of Supervisors, 211 Cal. 271, 276). Appellant astutely argues that all legal effects intended by the Education Code are stated therein and that criminal penalties may not be imported from the Government Code, citing 23 Cal. Jr., p. 741, Sec. 118; Matter of Ellsworth, 165 Cal. 677, 681; Perkins v. Thornburgh, 10 Cal. 189, 191. In those decisions the courts found as a matter of law a special statute controlled a general statute.[3]

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[3] For illustration, in the *Matter of Ellsworth*, after the Board of Supervisors had enacted Ordinance No. 89 regulating saloons in Sonoma county, an initiative ordinance was adopted limiting the issuance of

Section 1014 was not intended to be a special statute designed to negate or uproot Section 1097 of the Government Code. It was enacted as Section 104 of the school law in 1870 (Stats. 1870, ch. 556, p. 824). It was amended in 1876 by changing the language "shall be, *directly or indirectly* interested" by omitting the italicized words and has come down to the Education Code in the same form. Sections 1090 to 1097 were made a part of "an Act to Prohibit Officers from Being interested in Certain Contracts" adopted May 1, 1851. In 1872 it was made into Sections 920, 921 and 922 of the Political Code, and Section 71 of the Penal Code. In 1943 the three sections were enacted as Sections 1090, 1091 and 1092 of the Government Code, and Section 71 of the Penal Code was placed in the Government Code as Section 1097. But search the history of the two statutes as one will, the researcher always comes up with the discovery that it has been the constant policy of this state from the beginning to make it a crime for an officer to make a contract on behalf of a public agency while he is interested in the subject matter of the contract. The fact that the lawmakers caused Section 1097 to be placed in the Penal Code in 1872 indicates a legislative intent to have it apply to *all* violators.

Sections 1011 of the Education Code and 1090 and 1097 of the Government Code Are Constitutional

Appellant contends that if these sections are construed to create a crime they would cause the punishment of a person for the act of others whom he cannot control. It is true that there can be no crime in the absence of a statute requiring an act or forbidding an omission. However, in taking the measure of the statutes here under consideration, it must be kept in mind that the act denounced is the "possession of an interest". The quoted phrase does not signify that a member of the Board of Education is merely

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licenses to bona fide hotels. Mr. Ellsworth procured a license under Ordinance 89 for operating a saloon in county territory. While he was accused of violating the initiative ordinance, the authorities undertook to apply the provisions of Ordinance 89 with which he had complied. They failed at invoking the initiative ordinance because it provided no penalty.

inhibited from sharing directly in the profits or advantages to be derived from a contract made by the board in its official capacity. It means that a member is forbidden to enter into any business relation or arrangement with a person that will tend to cause the member to favor such person when any contract with the school district proposed by such person shall be presented for the board's approval. It does not require the member to acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute but if the member is for any reason placed in such position that he prefers the execution of a proposed contract more than he desires the public good to be served then he is interested and when the board authorizes the contract, such member violates Sections 1090 and 1097. Sound public policy dictates that these officers shall be denied the right to have any personal interest in contracts negotiated by them in their official capacity. Such policy is obviously premised on the ancient truism that one cannot faithfully serve two masters at one and the same time. Statutes such as Section 1011 carry out this policy by insuring that the public officer will not be placed in a position in which his private interests might tempt him to uphold with less vigor the interests of the public (See Noble v. City of Palo Alto, 89 Cal. App. 47, 51; Stockton Plumbing and Supply Company v. Wheeler, 68 Cal. App. 592, 600). Making null a contract created by the Board of Education by virtue of the very act of confirming it was deemed by the Legislature to be an insufficient deterrent. By fixing the penalty prescribed by Section 1097 for a violation, the Legislature acted within the scope of its authority. Had it not done so, crisis after crisis would arise, wicked men would usurp the power and purloin the purse of the district leaving the public ultimately helpless and in the grasp of brigands. There is no compulsion for a man to become a board member, and when he does so, he is not obliged to make alliances with others who plan to engage in a transaction with the board.

Appellant asserts that "the annexation of Government Code Section 1097" to Section 1011 of the Education Code, thereby converting it into a crime, constitutes an inescap-

able legal trap; that all the essential elements of a crime are absent from 1011; that by a member's having an interest, Section 1011 merely creates a status; that by the innocent vote of the board, such innocent status is immediately made into a crime even though such interest-holding member be absent at the time the fatal vote is taken. Appellant, however, cites no pertinent authority in support of his thesis and his argument is based upon unauthorized assumptions. He is not being punished for the acts of others. Viewing the statute in a reasonable light, it is seen that the act which creates the public offense is the defendant's creation of a situation whereby he becomes interested in a public contract while he is a member of the board. The interest comes under the ban of Section 1090 whether the member brings about the situation or continues to be interested after knowledge of its existence. For a school trustee to have an "interest" in a contract he is not required to share directly in the profits to be realized. He has an interest the moment he places himself in a situation "where his personal interest will conflict with the faithful performance of his duty as trustee" (Moody v. Shuffleton, 203 Cal. 100, 105; see also Miller v. City of Martinez, 28 Cal. App. 2d 364, 370; Stockton Plumbing and Supply Company v. Wheeler, 68 Cal. App. 592, 602; Hobbs, Wall & Company v. Moran, 109 Cal. App. 316, 319-20). A board member must refrain from intentionally causing himself to be interested in a contract and if by chance he discovers he is interested prior to official action he should divest himself of such interest or avoid criminal liability by resigning from his office. The law does not concern itself with the nature of the contract and criminal responsibility is assessed without regard to whether it is fair or oppressive. In any event, the Legislature did not exceed the scope of its authority in enacting such measures to protect the public interest.

Appellant contends that his own lawful status may, by invoking the penalty provided by Section 1097 of the Government Code, be converted into a crime by the Board's lawful act in awarding a contract to the lowest responsible bidder. While it is true that the Education Code, Section 18051, requires the board to award the contract to the low-

est responsible bidder, appellant's argument is fallacious in that the board is prohibited from awarding a contract in which a member has an interest (Sections 1013 and 1090, supra). By virtue of such interest of a member at the time of the award the statutes are violated by all members who have knowledge of such interest. In the second place, to say that appellant had no control over the action of the board is to ignore a basic presumption, to wit, that members of the board who are disinterested in a contract will do their duty, and refrain from voting to award a contract in which another member is interested.

Appellant attacks Sections 1090 and 1097 as invalid in that they do not require a specific criminal intent. The absence of such requirement does not apply to crimes based on public policy. To save the state from certain acts universally deemed to be inimical to the public welfare, it is sufficient if the act is forbidden and a penalty is prescribed for its violation. The intent is imputed (People v. Pearson, 111 Cal. App. 2d —, 111 A. C. A. 9, 18). It is also contended that the last cited sections are invalid because they are uncertain, vague and indefinite; that in defining an offense the Legislature must use language that will not deceive the common mind, citing Winters v. New York, 333 U. S. 507, 515; Connally v. General Construction Company, 269 U. S. 285, 391. The answer to such contention is that it is necessary only that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited" (Lorenson v. Superior Court, 35 Cal. 2d 49, 60.) The rule of strict construction of penal statutes is abolished. They must be construed according to the fair import of their terms with a view of promoting justice (Penal Code, Sec. 4; see People v. Ovieda, 106 Cal. App. 2d 690, 693). ". . . in determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be

subject to its terms" (Pacific Coast Dairy v. Police Court of the City and County of San Francisco, 214 Cal. 668, 676). No reasonably intelligent person can fail to understand the meaning of "interest" or the significance of "contract." Both are of frequent use in the market place as well as in the counting house. Inasmuch as the language employed in the statutes under attack is clear and the words are such as a person of average intelligence can understand, it must be held that there is no want of certainty or definiteness in them. But more difficulty in ascertaining the meaning of the words employed or the fact that the language is ambiguous will not invalidate a statute (Pacific Coast Dairy v. Police Court, supra.) It must be upheld unless its nullity clearly, positively and unmistakably appears (Lockheed Aircraft Corporation v. Superior Court, 28 Cal. 2d 481, 484.) Neither is a statute void for vagueness and uncertainty if its meaning may be inferred or because the legislative intent might have been declared in plainer terms (50 Am. Jur. 489, 490; Hunt v. State, 146 N. E. 329, 330.)

That appellant had an interest in the board's contract with Jack & Jill will appear in the discussion of the evidence.

Facts Sufficient

Assuming for the moment that the law was correctly interpreted by the trial court, the labors of this court on the question of the sufficiency of the proof are abbreviated by the long-established policy of appellate procedure which binds a reviewing court to take the verdict or the findings as determined by the court below. Only when, as a matter of law, no substantial, legal evidence can be found in the record, may the appellate court set aside a verdict. The court must assume as true the existence of every fact which the jury could reasonably have found, every fair inference which it could have deduced (People v. Deysher, 2 Cal. 2d 141, 149). The same court went a step further in People v. Newland, 15 Cal. 2d 678, 681, where it declared that before the verdict of a jury which has been approved by the trial court, can be set aside upon the ground of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evi-

dence to support the conclusion reached in the court below." In the same decision, the court announced that because the circumstances which convicted the accused might also reasonably be reconciled with his innocence, the appellate court will not for that reason molest the verdict.

Now, not only did the State prove a series of facts and circumstances which, if believed, make appellant's guilt palpable, but despite the scorpion-like shadows that lowered over the drama he steadfastly maintained his silence; neither denied nor explained. Hence, so far as the facts are concerned, "however devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and connection made," he is guilty of being interested in the contract at the time he, as a board member, voted for it (See People v. Deysher, supra, page 146). Not only did appellant vote for the contract with Jack & Jill, but the jury believed the evidence that he solicited it and before sitting in judgment upon it he had leased his vacant store to the ice cream company at a generous rental and so engineered the proceedings of the Purchasing Committee as to make certain the allocation to Jack & Jill of a large share of the board's ice-cream business for the ensuing year. Had he not telephoned the office of Jack & Jill at first? Had he not followed that call with proposals to lease the vacant store? Had he not drawn the lease and put Jack & Jill in possession of the place? Had he not caused them to submit a low bid to supply the ice cream? Had he not caused his own appointment as chairman of the Purchasing Committee and induced his committee to include Jack & Jill among the contractors to share in the schools' ice cream business? But for such aggressive activities, it is not likely that the world would ever have known that appellant owned a vacant store or that his zeal to make it a paying investment would clash with his loyalty to the Board of Education. But the evidence adopted by the jury was sufficient to convince them that appellant had such an interest in the ice cream contract as would tend to prevent his exercise of a jealous concern for the best interests of the school district. In fact, the jury evidently believed that appellant's interest in Jack & Jill and their

permanency as tenants of his store did influence his conduct as a trustee. So believing, their verdict that he violated section 1097 was based on legal evidence (Raymond v. Bartlett, 77 Cal. App. 2d 283, 286; Salada Beach Public Utility District v. Anderson, 50 Cal. App. 2d 306, 309; Moody v. Shuffleton, 203 Cal. 100, 105).

Appellant asserts with emphasis that there is no evidence that he was a landlord of Jack & Jill. It is true that no written lease was adduced or conversation proved showing that appellant leased his store to that partnership. But it cannot be denied that the jury drew a reasonable inference in concluding that the lease was given to Irving Wass as agent of Jack & Jill. Appellant's telephone call to Bresler of Jack & Jill that he desired a tenant for his vacant store; Bresler's return call and visit; agreement between the two on the terms of a lease and that the writing should name an employee of the partnership as lessee; the use of the store as a retail dispensary of Jack & Jill products with that name on the exterior of the building; appellant's receipt of rental checks from the office of Jack & Jill signed by Bresler Ice Cream Co., per David Bresler—such evidence and appellant's silence justified a rational inference that Jack & Jill was in fact the lessee. That deduction is further supported by the evidence that when appellant desired an advance on the rental he contacted Bresler at the Jack & Jill office and promptly received from the company a cashier's check for the advance payment of rent.

There is no proof that Wass ever paid rent on appellant's store. While the partnership of Blagg and Bresler operated their ice cream business at that location, there is no conclusive proof that they were tenants of appellant. *That firm did not exist at the time of Bresler's arrangements with appellant for the lease or when the lease was made to Wass or when appellant received the $600 cashier's check for the first payment on the lease.* Appellant can readily see that such circumstances warrant the inference that Jack & Jill were, in truth, his tenants. Indeed, in determining whether appellant had an interest in the ice cream contract, the jury was not required to take his bare denial or his explanation, but it was their function to explore the mist of conflicting

evidence and find the vital, ultimate fact (People v. Deysher, 2 Cal. 2d 141, 146).

In support of his claim, appellant contends that his purpose in having Jack & Jill bid on the ice cream contract was "to bring about a crack in the monopoly" and as a result of that bid the school year of 1949-1950 saved $72,000 and substantial savings for subsequent years and that such savings inured to the benefit of the children. While the price of a school lunch was reduced from 25 cents to 20 cents in the spring of 1949—prior to the Jack and Jill contract—yet after the contract and within the very next school year the price of a school lunch was raised back to 25 cents. Such facts were not calculated to induce the jury to adopt appellant's theory that he had caused Jack & Jill to bid on the ice cream contract to break the ice cream monopoly and save thousands of dollars to the district and its constituency. And whatever virtue might be ascribed to the Jack & Jill contract the jury were not obliged to accept it as conclusive proof that appellant had no prohibitive interest in the contract.

Was the Interest Prohibitive?

Appellant extends his artful argument to include the contention that an officer to be "interested" in a contract in the statutory significance of the word must participate in the advantages or detriments resulting from the contract. In support of his thesis he cites Martin Bros. v. City of Concord, 110 Cal. App. 2d 215, 217; Escondido Lumber Company v. Baldwin, 2 Cal. App. 606, 608. Such authorities are distinguished on their facts, The city councilman of Concord could not have been influenced with respect to the contract for the reason that the interest was not yet in existence. In the latter decision the court observed: "The mere fact that the contractor, without previous arrangement, or agreement, saw fit to buy of a corporation, for which one of the trustees was an agent, certain materials used in the construction of the house, would not render the contract void, voidable, or ordinarily subject it to merited criticism." In other words, argues appellant, if the officer has a direct and present interest in a contract from which he will profit, he violates the statute

by voting for the contract (People v. Deysher, supra), but if he has merely a potentially pecuniary benefit although he actually receives the benefit after the contract is executed, the interest is not prohibited. But controversies cannot be adjudicated by formulae. Whether a trustee holds a prohibitive interest at the times he votes for a contract must be determined from all the facts existing at the time of its adoption. (People v. Deysher, supra, 149; Tuscan v. Smith, 130 Me. 36; 153 Atl. 289, 294; Yonkers Bus Inc. v. Maltbie, 23 N. Y. S. 2d 87, 90-91.) If the facts in the instant case fairly warranted the finding that appellant created the relationship of landlord and tenant between himself and Jack & Jill with the purpose of using his influence on the Board of Education to get some ice cream business awarded to his tenants, then their implied finding that he had a prohibitive interest cannot be upset. The decision in Commonwealth v. Strickler, 259 Pa. 60; 102 Atl. 282, is not authority: (1) it did not have such florid facts to show interest; (2) it is contrary to the statutes here involved. (See Moody v. Shuffleton, 203 Cal. 100; Stockton Plumbing and Supply Co. v. Wheeler, 68 Cal. App. 592, 603.) In the case at bar, all negotiations for the lease and payment for the first and last months' rental on the store were complete, appellant had suggested to Bresler that he bid on the ice cream contracts and had promised his support in obtaining ice-cream business. From those facts it was reasonable to find that appellant's interest existed when the board awarded Jack & Jill the contract.

The statutes are general in prohibiting an officer from being interested in a contract. He must not place himself in a position where his personal interest will conflict with his faithful performance as trustee and, however so fair the contract may appear to be, the trustee will not be suffered to occupy a position so equivocal and so fraught with temptation. (Moody v. Shuffleton, supra, 104.) Precedent is of little value except as an analogue. Whether an officer or board member was interested at the time he or his board made the contract is a question for determination in each controversy. If the jury were convinced by all the evidence that appellant intentionally created a situation whereby he

became interested in the contract to be awarded by the board and that he actively participated in effectuating the contract their verdict cannot be upset. The proof reasonably warrants findings that appellant not only had knowledge of his interest but strove to transmit it into material gain.

Instructions Not Prejudicial

The discussion of "interest" brings us to appellant's attack upon the jury instructions. The prejudice, he asserts, was aggravated by the fact that the prosecution tried two cases, to wit, (1) for the defendant's acceptance of a bribe; (2) for defendant's having an interest in the contract. Appellant says that his conviction for having an interest was due solely to the suspicion and prejudice aroused by the charge of bribery and the court's "contradictory" instructions.[4] *A* was given at the request of the People; *B* and *C*

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[4] Instruction *A*

"The word 'interested' as used in Government Code Section 1090 and Education Code Section 1011 means any influence which might interfere with a board member's unqualified devotion to his public duty. The interest may be direct or indirect and includes any monetary or proprietary benefits, or gain of any sort, or the contingent possibility of pecuniary benefits.

"The interest is direct when the board member, in his official capacity, does business with himself in his private capacity.

"The interest is indirect when the board member enters into a contract in his official capacity with a business firm, which business firm, by reason of the board member's relationship to it at the time the contract is awarded, is in a position to render actual or potential pecuniary benefit to the board member based on the contract the business firm has received."

Instruction *B*

"In order to find the defendant OLIN E. DARBY guilty of the crimes alleged in the indictment, you must find beyond a reasonable doubt and to a moral certainty that the defendant has 'a pecuniary or proprietary interest' in the contracts alleged in Counts I, II and III of the indictment.

"It is not sufficient to find that the defendant OLIN E. DARBY had 'a mere possible, contingent interest' or 'mere mental interest in the question or general subject' of such contracts. In order to find the defendant guilty under any count you must find that the interest of OLIN E. DARBY in the contracts alleged was such that he stood to 'gain or lose something' as a result of the contracts alleged."

were requested by appellant. If the jury had believed the facts as contended by appellant, instructions *B* and *C* would have been their authority to acquit.

But they applied the definition of "interest" as contained in *A* and convicted him." They believed he had more than "a mere, possible, contingent, or mental interest." They determined that he stood to gain or lose something by the board's acceptance of the bid of Jack & Jill; that his interest was not remote, doubtful or speculative but was certain and direct. They found that his interest was personal and that it might interfere with the unbiased discharge of his duty to the public or might prevent his exercising absolute loyalty and undivided allegiance to the best interests of the Los Angeles School Districts. It was therefore a prohibitive interest as contemplated by the statutes. (Raymond v. Bartlett, 77 Cal. App. 2d 283; 286.) If the jury believed his interest in the ice cream contract was such as to tend in any degree to influence appellant's conduct in voting for the contract, their verdict was justified. (Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 602.) In that case the petitioner's foreman was a member of the City Council,

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Instruction *C*

"The interest in contracts which is prohibited by law to members of governing bodies of school districts is not '(1) A mere possible, contingent interest, in an interest in the question or general subject to which the matter . . . relates, one that is visible, contingent and capable of precise proof . . . it must therefore depend upon facts capable of being precisely averred and proved . . . (2) It must be a pecuniary or proprietary interest, a relation by which . . . he will gain or lose something by the result . . . (3) It must be certain, and not merely possible.

"'Thus the mere mental interest which one has in a public question merely because he is a citizen or member of the civic body to be affected by the question is not the interest which the law has in mind.'

"The interest prohibited by law cannot be 'remote, doubtful and speculative' but must be 'certain in fact'.

"The interest prohibited by law is a 'certain, definable, pecuniary, or proprietary interest or relation which will be directly affected, by the action taken on the contracts in question. It is a 'pecuniary or personal right or privilege directly affected by or immediately dependent upon' the contracts in question.

"In short, the interest prohibited by law must be 'a direct, pecuniary interest' and not an interest that is speculative."

but was absent at the time the contract was voted. The interest he had in the contract nullified it although it meant no direct profit to him. A similar situation obtained in Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316. Dressler was a member of the City Council and was on salary and was not a stockholder in, but was manager for, Hobbs & Wall, and as councilman voted to pay their claims for the merchandise purchased by Crescent City. Mr. Justice Thompson observed, page 317, that Dressler "*was indirectly interested in the transaction* and that it was therefore illegal . . . Our courts have been very scrupulous in the enforcement of the spirit of statutes similar to the one which is here involved." (Page 320.) In People v. Deysher, 2 Cal. 2d 141, the court directed the jury that defendant had a personal interest in the contract if he possessed any rights or was obligated to perform any duty or *could have suffered any liability or losses or if any benefit or advantage could accrue to the defendant, whether present, future ascertained or potential.*

In support of his contention that he had no interest in the contract, appellant cites Central Pacific Railway v. Superior Court, 211 Cal. 706; Favorite v. Superior Court, 181 Cal. 261; Ex parte Guerrero, 69 Cal. 88; Cuyamaca Water Company v. Superior Court, 193 Cal. 584; Goodspeed v. Great Western Power Company, 19 Cal. App. 2d 438. Although in each of them the interest under investigation was not in existence at the time of the contract, yet the question considered in each controversy was whether a judge was disqualified because of an interest in the matter on trial. Those decisions establish that a judge is not disqualified where his interest is "remote, contingent and speculative"; that he is not disqualified unless his interest is "direct, proximate, substantial and certain" and of such immediate character that the judge will gain or lose by the direct, legal operation and effect of the judgment. As applied to judges, "interest" has a highly special and definite meaning. "It means an interest direct, proximate, inherent in the instant event." (Goodspeed v. Western Power Company, 19 Cal. App. 2d 438, 444.) In the cases involving the judges, none of them had a "direct," "pecuniary," or "proprietary" interest in the controversy.

Where public "officials" as a class are involved, there should be no laxity in the enforcement of the statutes against their having an interest.

Appellant insists that his instructions *B* and *C* are inconsistent with the People's instruction *A*. Such asserted conflict is not to be discerned when all three are read as one. (People v. Weatherford, 87 Cal. App. 2d 275, 278). Instructions *B* and *C* emphasize that the disabling interest must be more than a remote, doubtful, speculative, possible, contingent or mental interest, and that in order to convict the accused, it must be found that he stood to gain or lose something. Under the evidence it was reasonable to find that the interest of appellant in the ice cream contract was such interest as might have interfered with appellant's unqualified devotion to his public duty. Whether the interest was direct or indirect, remote or contingent, the sum and substance of the three instructions read as a whole is that if the interest of the member is sufficient to cause him to be swayed in the slightest degree from his duty to the public, it is a violation of section 1097 as well as of 1011. It is more than possible that an interest may be contingent or remote and yet influence the member's judgment or vote. In view of the evidence adopted by the jury, the court was generous in giving instructions *B* and *C* but in all fairness they do not conflict with the principles declared in *A*. (See Moody v. Shuffleton, 203 Cal. 100, 105; People v. Deysher, 2 Cal. 2d 141, 146.) But conceding, arguendo, that the two instructions read at appellant's request conflict with that prepared by the district attorney, a reversal would not be proper for three reasons: (1) instruction *A* is a correct statement of the law; (2) instructions *B* and *C* gave appellant an advantage in permitting the jury to consider the facts in a light more favorable than if *A* only had been read; (3) if there be a conflict, it was caused by appellant's own act in submitting *B* and *C*. (People v. Harris, 169 Cal. 53, 59; People v. Lanzit, 70 Cal. App. 498, 513.)

Error is assigned with respect to the following instruction: "The People do not have to prove actual fraud, dishonesty, or loss; nor is it a defense to a prosecution under section 1097 of the Government Code that there was no

actual fraud or dishonesty or loss." Appellant contends that if such instruction be correct, the court prejudiced him by permitting evidence of fraud and dishonesty, i. e., the payments of excessive rentals. The answer to such contention is that there is no inhibition against allowing proof of an officer's dishonesty, for if it existed, such fact had to be a part of the evidence of his becoming interested. (See Williamson v. L. A. County Flood Control District, 42 Cal. App. 2d 622.) The jury were entitled to know all the facts which tended to prove the officer's interest even though such proof might show violations of other penal statutes. (See People v. Pearson, 111 Cal. App. 2d ——, 111 A. C. A. 9, 18-19.) The core of the criticized instructions is that even though there is proof of dishonesty the jury's chief concern is to determine whether the accused was interested.

No Prejudice in Rulings at the Trial

That there was no error in admitting evidence of appellant's attempt to obtain a higher income from his store by helping Jack & Jill obtain a share of the ice cream business has been demonstrated above. Neither was there error in permitting the district attorney to refresh the memory of a witness by reading to him on the stand his testimony before the grand jury. Refreshing the memory of a witness is not to impeach him. It is a common incident of trials to remind a witness of what he said on former occasions, and this may be done by the party calling him. (People v. Durrant, 116 Cal. 179, 214; People v. Horowitz, 70 Cal. App. 2d 675, 691; People v. Allen, 47 Cal. App. 2d 735, 743.) A detailed discussion of the witnesses whose memories were refreshed could add nothing of value to the above statement of the doctrine.

In Stockton Plumbing & Supply v. Wheeler, supra, page 603, it was conceded that the contract was perfectly fair in all respects to the city and that neither the councilman nor his employer gained any advantage thereby. But the contract was held illegal merely because the councilman was interested in seeing his employer make sales to the city. (See also Hobbs, Wall & Company v. Moran, 109 Cal. App. 316, 320.) By virtue of the law as above announced there

was no error in the court's instructing the jury that the existence of a combine and that savings to the school system resulted from the bid of Jack & Jill, is no defense to the charge contained in the indictment. The rejection of evidence offered for the purpose of showing that before Jack & Jill forced competitive bidding, one of the bidders charged the schools higher prices than it received from private retail dealers and that prices to the schools were lower each year thereafter; also, the rejection of proof offered for the purpose of showing that appellant had requested Olin to be on the lookout for a good tenant for his vacant store through other ice cream companies—both rulings were correct. Such evidence was immaterial to the issue as to whether appellant had an interest in seeing Jack & Jill obtain a share of the ice cream purchases for the school. That appellant may have had an interest as a public official does not disprove that he had a personal motive in having the board accept the bid of Jack & Jill. But even had such rulings been erroneous, no prejudice could have resulted for the reason that the court did admit sufficient of such evidence to enable appellant to present his point.

Appellant assigns as error the court's examination of Mr. Bresler, " a key witness for the prosecution." Mr. Bresler had testified that, after the introductions were finished, appellant "inferred that with the right kind of prices we may be able to acquire . . . a little ice cream business in the Board of Education." The court thereupon examined Bresler with respect to the latter's use of the word "inferred." The court's examination developed that the witness meant that appellant had in substance said they might get some of the board's ice cream business. Not only was there no error in the court's participation in quizzing Bresler but it was the court's duty to see that no testimony be left in a fog by reason of a misuse of words by a witness. (People v. Harris, 87 Cal. App. 2d 818, 826; People v. Cagigas, 69 Cal. App. 2d 301, 303; People v. Grebe, 105 Cal. App. 2d 27, 33). But if the court's conduct had been prejudicial, the detriment was cured by appellant's cross-examination whereby he developed the witness' testimony to be as it had been given in response to the court's questions.

No prejudice was suffered by appellant on account of the court's admitting "full evidence before the jury of an

Anaheim lease entered into after the school contract was awarded." Evidence was received that appellant on August 31, 1949, leased his Anaheim store to Bresler for the purpose of showing appellant's plan, design and motive. When the court learned that the Anaheim lease was subsequent to the date (August 23, 1949) of the Jack & Jill contract, the evidence as to the Anaheim lease was stricken. The jury are presumed to have followed the court's order to disregard all the evidence relative to the Anaheim property. (People v. Sourisseau, 62 Cal. App. 2d 917, 929.)

Prior to the trial appellant filed an affidavit of prejudice against the trial judge averring that the judge was prejudiced against appellant for having failed to file his petition for a writ of prohibition in the Supreme Court by presenting it to the Chief Justice in person. He contends that the court erred in failing to comply with section 170 of the Code of Civil Procedure[5] and thereby deprived appellant of the right to have the court's disqualification tried by a disinterested judge.

The fallacy of appellant's contention lies in the fact that the affidavit filed does not contain the facts whereby he would prove the judge's prejudice. Because it is insufficient in that respect, the court properly proceeded with the trial.

The affidavit averred also that the judge had prejudged the law on the question of an officer's illegal interest in a contract and had refused to grant appellant a continuance during the period of the pendency of his petition in the Supreme Court. While the trial judge may not determine a charge of his own disqualification, he may disregard an affidavit of prejudice when it avers conclusions and does not contain facts in proof of his prejudice. When the affidavit is thus insufficient, the judge can so determine, where-

[5] Section 170 provides that no judge shall act as such in any action when it is made to appear that, by reason of his own bias or prejudice, a fair and impartial trial cannot be had before him. When he has knowledge of the facts which disqualify him, and fails to declare them in open court, any party appearing in the action may file his verified written objection to a trial before such judge, setting forth the facts constituting the ground of the disqualification. After the judge has filed his verified answer thereto, the question of his own disqualification shall be heard and determined by some other judge agreed upon or selected by the chairman of the Judicial Council. The section contains a detailed statement of the procedure.

upon the procedure provided by section 170, supra, is not applicable. (Ephraim v. Superior Court, 42 Cal. App. 2d 578; People v. Nolan, 126 Cal. App. 623, 628; People v. Berman, 117 Cal. App. 334, 339.) Not only was there an absence of facts indicating prejudice on the part of the trial judge, there is not the slightest showing of his hostility toward appellant. It was therefore insufficient. (Goodspeed v. Great Western Power Company, 19 Cal. App. 2d 438, 450.) Also, there is nothing for another judge to try where the trial judge is accused merely of having erroneous legal opinions. (Ryan v. Welte, 87 Cal. App. 2d 888, 895.)

Another basis of the charge of prejudice against appellant was that the judge denied him a continuance. Such accusation raises no issue of fact. Such a denial involved the legal question addressed to the court's discretion. If the continuance had been denied, the trial judge had reasonable grounds. Prohibition had already been denied by both the Superior Court and the District Court of Appeal and no sufficient basis for a continuance was alleged. But, finally, the trial judge did grant a continuance of six days after the petition for a writ had been denied by this court.

Appellant charges that the District Attorney prejudiced him by withholding documentary proof that appellant's store was operated under a written agreement between Blagg and Bresler. It is conceded that Mr. Blagg, while on the stand, believed the District Attorney had possession of articles of partnership between Blagg and Bresler. Thereupon, the prosecution refreshed Blagg's memory and showed that it was the agreement of dissolution of such partnership that Blagg had in mind which document was delivered to appellant's counsel. Immediately, thereafter, Blagg produced a copy of the articles of partnership of Bresler and Blagg. However, they are immaterial for the reason that *such articles were executed after Bresler as agent of Jack & Jill had consummated arrangements to lease appellant's vacant store*—from which it was fairly inferrable that Bresler took the lease for Jack & Jill.

Appellant charges that he was prejudiced by the misconduct of the District Attorney's withholding evidence that the business manager of the school system favored giving the entire ice cream contract to Jack & Jill. Such proof

would have been immaterial. But after the prosecution proved by three witnesses what occurred before the purchasing committee on August 4 when it considered the bid of Jack & Jill, it was shown by the cross-examination of such witnesses that the business manager of the board desired to award the entire contract to Jack & Jill. Also, he testified that to do so would have been contrary to the usual manner of awarding contracts. Appellant says he was prejudiced by the prosecutor's announcement to the news reporters at every court session what he expected to prove and his version of the testimony and that thus the jury were put in a position to prejudge the proof before they heard it from the witnesses. However, there is neither evidence of the statement made nor a bill of exceptions showing such acts were done by the district attorney. All the testimony at the trial had already been given before the grand jury. A record of it was available to the public. No part of the record is cited as proof that any juror heard any person talk about the evidence or read a news account of the testimony in violation of the instruction given at the commencement of the trial.

No prejudice to appellant could have resulted from the cross-examination of his character witnesses. After they had given him a good character they were asked whether they had ever heard of appellant's staying at a hotel in Yosemite as the guest of the principal stockholder of a corporation that had contracts with the board for transportation. After a character witness has testified it is proper to make such reasonable and searching inquiries as will test the accuracy and honesty of his testimony. It is proper to inquire whether the witness has heard of certain rumors, occurrences or charges as to specific acts of misconduct of the accused that might throw light upon the witness' testimony of the good reputation shown by his examination in chief. (People v. Gin Shue, 58 Cal. App. 2d 625, 634; People v. McKenna, 11 Cal. 2d 327, 335; People v. Stennett, 51 Cal. App. 370, 382.) After such a witness has testified as to the defendant's good character his credibility is in issue. One means available to the prosecution for testing his credibility is to inquire in good faith whether such witness has heard of specified acts reflecting upon the integrity

of the defendant. It is not incumbent upon the prosecution to prove the truth of the rumor or asserted misdeed. Indeed, an offer to prove it would be prejudicial misconduct. (People v. Beltran, 94 Cal. App. 2d 197, 209.)

No prejudice to the accused was caused by the district attorney's allusion, in addressing the jury, to appellant's son whom he had brought home from the army to testify. That reference was an incident in the prosecutor's discussion of appellant's failure to give his own explanation of the events established against him.

Finally, there was no error in denying the motion for a new trial. Appellant made an affidavit that he could not with reasonable diligence have discovered before the trial evidence to refute the testimony of Mr. Bresler with reference to his conversation with Bresler at the office of the board to the effect that Mr. Darby indicated that with the right kind of prices he might be able to help Bresler acquire a little ice cream business; Bresler told Darby at the board's office the check was coming from Bresler, he would send it by Olin. Such affidavit averred also that Olin could testify in contradiction to Bresler; that at the trial he had every reason to believe that Olin would deny Bresler's testimony. Because Olin was ill and could not attend the trial, appellant conceives that he should have a new trial.

In the first place, the granting of the motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. Whether the new witness was discovered with due diligence; whether his testimony would probably affect a different verdict—those were the factors that were weighed by the trial judge in deciding the motion. (People v. Byrne, 160 Cal. 217, 225; People v. Chavez, 100 Cal. App. 2d 214, 219). There was no showing of diligence. Both Olin's and Bresler's testimony before the grand jury shows that Olin was present at the board's office; that Olin there introduced Bresler to Darby. During the trial the prosecution announced Olin's illness, and his inability to attend the trial for ten days. Appellant neither demanded a continuance nor leave to take Olin's deposition. Moreover, appellant, as a party to the conversation with Bresler could have testified to all that

took place at the board's office. Also, no showing was made that Olin would probably recover from his illness, or if he should, that he would be able to testify. The fact that Olin would testify that at the board's office nothing was said about appellant's leasing his store to Jack & Jill does not require a new trial. If both he and Bresler should in testifying contradict each other, it would create no more than a conflict, not a ground for a new trial. In addition thereto, Mr. Olin could not deny the statements Bresler had made over the telephone with respect to Bresler's taking a lease. Neither could Olin disprove appellant's receipt of the checks for rent of the store. He was witness to neither. After the court had extended every opportnuity available for the presentation of his defense and after the accused had maintained a sphinx-like silence toward accusations and inferences that bore down upon him, it would have been gross error to allow a new trial in order for appellant to have another opportunity to gain a favorable verdict.

Appellant's motion to vacate the order correcting the record is denied. The appeals from the verdict and the several nonappealable orders, to wit, order overruling demurrer, order denying defendant's motion to set aside the indictment, order denying defendant's motion to strike the indictment, order denying defendant's motion for a continuance, order refusing to disqualify the trial judge upon defendant's filing an affidavit averring prejudice on the part of such judge, order denying defendant's motions to dismiss, before and after taking of the People's testimony, order denying motion to dismiss at the close of all the evidence, order denying motion to instruct the jury to return a verdict for defendant, order denying motion in arrest of judgment are dismissed.

The judgment and the order denying the motion for a new trial are affirmed.

MOORE, P. J.

I concur.

FOX, J.

I dissent.

McCOMB, J.

(7261)

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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 662

OLIN E. DARBY,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDMUND G. BROWN,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 662

D.C.A. CRIM. No. 4839

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee,

vs.

OLIN E. DARBY,
Defendant and Appellant

APPELLEE'S STATEMENT OPPOSING JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENT.

Appellee respectfully presents the following matters making against the jurisdiction of this Honorable Court asserted by appellant.

Statement of the Case

The Grand Jury of Los Angeles County returned an indictment against the appellant charging him with a vio-

lation of Section 1097 of the Government Code of the State of California, in that he wilfully and knowingly had an unlawful interest in a contract entered into between the Los Angeles Board of Education, of which he was a member, and the Jack and Jill Ice Cream Company dated August 23, 1949, contrary to the provisions of Section 1011 of the Education Code and Section 1090 of the Government Code. Appellant was found guilty after trial by jury and was granted probation for a period of three years on condition that he pay a fine of $1,000.00. He prosecuted an appeal from the conviction to the District Court of Appeal which affirmed the conviction. The Supreme Court of California denied a hearing. The three California statutes involved in the case read as follows:

> "§ 1011. Non-interest of board members in contracts. No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."
>
> "§ 1090. Interest in contract made in official capacity prohibited. Members of the legislature, state, county, judicial district and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members."
>
> "§ 1097. Penalty for violation of prohibitions. Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the State prison for not more than five years, and is forever disqualified from holding any office in this State."

Jurisdictional Question

Appellant challenges the constitutionality of the foregoing statutes of California on two grounds:

(1) They fail to designate the essential elements of a crime;

(2) They are too vague, indefinite and uncertain to be upheld as criminal statutes.

The appellee asserts that the appellant has failed to raise a substantial Federal question on the ground that the questions raised by the appellant are so unsubstantial as not to need further argument, (Rule 7, Supreme Court Rules), and on the further ground that the questions raised by the appellant, when examined with reference to the facts of the case as disclosed in the opinion of the District Court of Appeal, show that the Federal question relied upon by the appellant is devoid of any substantial foundation or merit. (*Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 23 S. Ct. 123, 125.)

Statement of the Facts

Appellant's appointment to membership on the Los Angeles Board of Education was on May 27, 1947. He was president of the board for the school year July 1, 1948 to June 30, 1949. He was elected to succeed himself for the four-year term commencing July 1, 1951. However, he had not arrived at a general election before the commencement of the series of events recited herein.

In 1949 appellant was owner of a vacant store on Third Street in Los Angeles. In June he telephoned the office of David Bresler, member of the firm of Jack and Jill. When Bresler returned the call, appellant informed him of his vacant store and commended it as a good location for com-

mencing an ice cream business. Bresler sent Mr. Olin, general manager of Jack and Jill to inspect the store. Late in June, 1949, Mr. Olin introduced Bresler to appellant at the board's office as a partner in Jack and Jill. Appellant followed the introduction with an inquiry whether Bresler would be interested in bidding on school ice cream business. Indeed, he would, if there was a chance. Appellant could help him get it if Jack and Jill were the low bidders. Appellant thereupon injected into the discussion the leasing of his vacant store and quoted a rental of $300 monthly and suggested his earnest desire to procure a good tenant.

Arrangements were completed for appellant to draw the lease on the Third Street property by inserting as lessee the name of one Wass, an employee of Jack and Jill. Bresler would send appellant a check for $600 dated June 24, 1949, in payment of the first and last months of the lease term. On receipt of the lease signed by appellant, Bresler had Wass execute it. Appellant received the executed lease and the $600 check. The $300 was received monthly by appellant until February, 1950. The premises were used as a retail dispensary of the products of Jack and Jill whose name was on the outside.

On July 1, 1949, appellant was by President Elliott of the Board duly appointed chairman of the insurance committee. He promptly called Elliott's attention to his former request to be appointed chairman of the purchasing and distribution committee, herein referred to as the purchasing committee. Thereupon the president withdrew his appointment of Earle D. Baker from the coveted chairmanship, appointed him to the insurance committee, and named appellant as chairman of the purchasing committee. Among the duties of the latter committee is that of receiving the tabulation sheet containing a summary of ice cream bids, the names of bidders and other items on which they have

bid and the prices of the bidders. On receipt of such summaries, the purchasing committee forwards its recommendations to the board which accordingly makes the awards of contracts. The purchasing committee convened on August 4, 1949, to consider the bids on ice cream contracts. They found Jack and Jill had made the low bid and that it had already been agreed to by all other bidders. By reason of the committee's inability to find one bidder alone capable of supplying the total output required, the committee decided to allocate the business among all the bidders. There followed a discussion among the members as to whether Jack and Jill, a newcomer to Los Angeles and relatively unknown, should be given more than a token award. Appellant took the position that since Jack and Jill had put in the low bid which had been met by all the other bidders, it should have more than a token amount and suggested it be given 20 per cent, or about $90,000 a year. Appellant's proposal was adopted by the purchasing committee whereupon he signed the committee's report dated August 22, 1949, recommending the purchase of ice cream from various bidders including Jack and Jill for the year following September 1, 1949. Thus Jack and Jill received 20 per cent of the gross ice cream sales to the board for the year, which paid them $68,250.18.

While some evidence was adduced that the fair monthly rental value of the Third Street store in July, 1949, was $300, other proof showed it did not exceed one-half that sum. An expert witness testified that it was worth less than $300 per month. While appellant received checks for $300 each month in payment of his lease, Blagg and Bresler, the lessees of Jack and Jill, paid the latter only $125 per month for a portion of the lease term, thereby requiring Jack and Jill to absorb the differential. In February, 1950, appellant offered to lease the store to Blagg at $125 a month. Another witness testified that the successor of Blagg and

Bresler obtained a lease at $250 rental monthly, and that appellant consented to reduce it to $175.

Appellant did not testify

(Facts taken from opinion of the District Court of Appeal.)

ARGUMENT

I

Section 1011 of the California Education Code and Sections 1090 and 1907 of the California Government Code Are Proper Criminal Statutes.

Appellant contends that the above-mentioned California Code provisions are unconstitutional as penal statutes because they fail to designate the essential elements of a crime. He maintains that if these sections are construed to create a crime, they would punish him for lawful acts on his part, and for an act of others over which he can exercise no control; he also argues that under these statutes there is no act or omission by him for which he is being punished, and there is no punishment under the California law for violation of these Code sections.

There is no dispute over the fundamental principle that every crime requires an act or omission in violation of a law forbidding or commanding it, to which a punishment is annexed, and in which there is a union or joint operation of an act or intent, California law so provides (Penal Code Sections 15 to 20.)

However, the statutes challenged by the appellant clearly meet these requirements. They make it a public offense for a public officer to be interested in any public contract entered into by a board in which he is a member. They are based upon a wise public policy resting on the truism that no person can faithfully serve two masters at one

time; that fidelity in the public officer must be maintained, and the law will not permit him to place himself in a position in which he might be tempted by his own private interests to disregard the interests of the public. It is apparent that a strict rule is required by the very conduct sought to be regulated. (See *Noble* v. *City of Palo Alto* (1928) 89 Cal. App. 47, 264, Pac. 529; *Stockton Plumbing & Supply Company* v. *Wheeler* (1924) 68 Cal. App. 592, 600, 229 Pac. 1020.

This principle is not unique to California law, but is fundamental to the continued existence of any form of government. It has been recognized by this Honorable Court (See *Crocker* v. *United States* (1916) 240 U. S. 74, 80; cf. U.S.C.A. Title 18 § 434.)

While it is true that contracts entered into in violation of these principles are void and unenforceable, still the California legislature has realized, as has the Congress of the United States, that this is not a sufficient deterrent to preclude such contracts from arising in the first place, and therefore, the legislative bodies have sought to implement the public policy by making such conduct on the part of the public officer criminal.

No attempt has been made by the California legislature to charge the public officer with criminal responsibility for legitimate business enterprise or for the conduct of others unrelated to his own. The act or omission to act which is involved in this public offense is a defendant's creation of his interest in a public contract while a member of the public board either by wilfully and knowingly acquiring the interest while serving on such board or by continuing to maintain the interest and failing to divest himself of it after knowledge of the existence of his interest in the contract. While it is true that it is a board which votes the contract, still it is the conduct of the individual board member

which subjects him to criminal liability if, with knowledge that a contract is to be awarded by his board, he acquires an interest in it, or having previously acquired the interest, he continues to maintain that interest and fails to divest himself of it prior to the award of the contract. Conceding that the law is strict in its operation, nevertheless it embodies a salutory principle which the California legislature in its discretion has placed and kept on the statute books of this State since 1851. (Stats. Cal. 1851, p. 522.)

It must also be noted that appellant's contention is totally without merit under the facts of this case for it is clear that he was guilty of both criminal omission as well as commission.

Appellant deliberately brought his interest in this contract of the Board of Education into existence. He not only solicited and secured the Jack and Jill Ice Cream Company as his tenant, but he likewise with design, through his affirmative acts in his official capacity as a Board member, assisted its obtaining a sizeable ice cream contract from the Board, thereby assuring himself payment by them of the monthly rental for the store which he leased to them in contemplation of his assisting them to obtain a substantial Board contract. He caused himself to be made chairman of the committee responsible for recommending the award of the contract, and it was through his efforts that a sizeable contract was awarded instead of a token contract. He voted as a member of the Board to approve his report recommending the contract to his tenant. At no time did he ever disclose to any member of his committee or to any other member of the Board his interest in this contract.

Nor is appellant correct in his statement that he had no control over the actions of the Board of Education. His disclosure at any time of his interest in the contract would have been sufficient to have precluded the Board from awarding it.

Nor is appellant correct in his assertion that the Board of Education must award a contract to the lowest bidder or violate the law. Under Section 1013 of the Education Code, a contract awarded in violation of Section 1011 of the Code is void, so that the Board could not lawfully enter into such a contract even if it were true that it was being awarded to the lowest bidder. Morever, the contract, under California law, is not awarded to the lowest bidder but to the lowest responsible bidder. The facts of this case indicate that it was appellant who insisted that a substantial contract be awarded over the protest of other officials connected with the Board, that the Jack and Jill Ice Cream Company was not established enough in the Los Angeles area to meet the test of responsibility.

With respect to the element of punishment, the District Court of Appeal held that Section 1097 of the Government Code does provide the punishment for this conduct. It could have done little else under the all-inclusive language of Section 1097. In any event, however, under the holdings of this Honorable Court, this matter of construction of state statutes is one for the appellate courts of this State with which it will not interfere.

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 480, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A.L.R. 831;
Pythias v. *Meyer*, 365 U. S. 30, 32, 33, 44 S. Ct. 432, 68 L. Ed. 885;
Guaranty Trust Co. v. *Blodgett*, 287 U. S. 509, 513, 53 S. Ct. 244, 77 L. Ed. 463;
Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 362, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254.

Appellant's contention that these statutes must fall because they require no specific criminal intent is also without merit. The statutes obviously fall within that class of crimes in which the legislature has provided that the only

intent required is the intent to do the forbidden thing or commit the interdicted act.

Appellant has advanced numerous hypothetical situations to substantiate his claim of unconstitutionality. He cannot bring himself within the facts of any of these situations, for he created the interest with intent to use his Board position to advance it; he was present at the committee meetings and board meeting at which it was so advanced; he had knowledge at all times of the existence of the interest and its conflict with his duties as a public official, and he intentionally refrained from announcing his interest and deliberately concealed it from his fellow board members.

II

Section 1011 of the Education Code and Sections 1090 and 1097 of the Government Code Are Neither Vague, Indefinite Nor Uncertain.

Appellant also asserts that these statutes are unconstitutional because they are so vague, indefinite and uncertain that they fail to advise men of common intelligence what acts are prohibited. This contention, too, is without merit. The class of persons affected, to-wit, public officers, is clear as is the prohibited conduct; the public officer readily knows when he or the board on which he sits is entering into a contract and with whom and whether or not his interest in the transaction transcends his interest as a public official.

The test which this Honorable Court had laid down repeatedly in analyzing the constitutionality of penal statutes is expressed again in its recent decision in the case of *Jordan* v. *DeGeorge* (1951) 341 U. S. 223, 71 S. Ct. 703, 708, as follows: "The test is whether the language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." This is the identical test applied by the courts of the State of

California (See: *Lorenson* v. *The Superior Court* (1950) 35 Cal. 2d 49, 60, 216 Pac. 2d 859), and was the test applied by the District Court of Appeal in the instant case.

All these statutes employ the same language forbidding a public official from being interested in a public contract entered into by him or the board of which he is a member. These words are clearly of sufficient common use as to inform the average reasonable public official of the conduct which is prohibited by the sections. This is particularly true in view of the fact that these sections embody a principle known to the common law and one based on a familiar truism.

> *Stockton Plumbing & Supply Co.* v. *Wheeler*, supra, (68 Cal. App. 592, 603);
> *Miller* v. *City of Martinez*, (28 Cal. App. 2d 364, 369);
> *County of Shasta* v. *Moody* (1928) 90 Cal. App. 519, 521;
> See also: *Crocker* v. *United States*, supra (1916) (240 U. S. 74, 80.)

The California legislature has connected the word "interest" with the word "contract", thereby indicating its use with a generally accepted and understood meaning. The term "interest" connotes a profit or benefit or advantage, and that this is a commonly accepted use of the term is indicated by its definition in Webster's New International Dictionary, 2d Ed., Unabridged, 1948, which defines the word interest as follows:

> "A right, title, share or participation in a thing. . . .
> "Participation in advantage, profit, and responsibility, as, an interest in a bakery. Hence, that in which one has such an interest; esp., business affairs;
> "Concern, or the state of being concerned or affected, esp. with respect to advantage, personal or general; hence, good regarded as a selfish benefit; profit; benefit."

While, generally speaking, the courts have held that the interest referred to in these statutes is a financial or proprietary interest, they have also not hesitated in view of the evil to guard against, to interpret this word in its broadest sense and to hold that the interest may be any personal interest which would prevent the public officer from exercising absolute loyalty and undivided allegiance to the best interest of the community he serves so that he is absolutely free from any influence other than that which may grow out of the obligations he owes the public.

Miller v. *City of Martinez*, supra (1938) (28 Cal. App. 2d 364, 370);
Stockton Plumbing & Supply Co. v. *Wheeler*, supra, (68 Cal. App. 592, 602);
Nielsen v. *Richards* (1925) 75 Cal. App. 680, 689, 243 Pac. 697;
Moody v. *Shuffleton*, 203 Cal. 100, 105;
Hobbs, Wall & Co. v. *Moran*, 109 Cal. App. 316, 319-320.

Even if it be conceded for purposes of argument that there may be some uncertainty in the language of these statutes when applied to certain situations, it does not follow that they are thereby rendered invalid. The purpose for which these statutes were enacted is clear, namely, to insure the undivided loyalty of the public offices of the State and its governmental units. When viewed in the light of its common law background and the evil to be curbed, which have been universally recognized, there can be little question about the intent of the legislature in passing these statutes, and certainly little room to challenge their constitutionality, regardless of whether or not more specific language may have been employed in enacting this type of legislation. Again, this Honorable Court has recognized this, making one of its most recent pronouncements in the

DeGeorge case, supra, at 71 S. Ct. Rep. 703, 708, where it stated:

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness (Citing case). Impossible standards of specificity are not required."

The California courts likewise recognize this as the opinion of the District Court of Appeal in the instant case points out.

III

The Appellant's Position Is Based upon Hypothetical and Abstract Propositions Unsupported by the Factual Record in This Case.

Throughout his argument, challenging the constitutionality of these statutes as criminal statutes, the appellant refers to and relies upon possibilities that are not present factually in this case. However, it is well settled that the courts, including this Honorable Court, will not give their consideration to questions involving the constitutionality of a statute based upon hypothetical and abstract questions not presented by the record before the court.

Bandini v. *Superior Court* (1931) 284 U. S. 8, 52 S. Ct. 103, 108;
People vs. Perry, (1931) 212 Cal. 186, 193, 298 Pac. 19.

The record in the instant case without contradiction by reason of the failure of the appellant to take the stand discloses that the appellant while president of the Board telephoned Bresler, one of the owners of the Jack & Jill Ice Cream Company at the company offices and solicited their occupancy of a vacant store owned by appellant. At a subsequent meeting in appellant's Board office after Bresler

had indicated his desire to have ice cream contracts from the Board in response to appellant's inquiry, and after appellant had indicated that he would be able to help Bresler to secure school business, Bresler made arrangements to lease the vacant store of appellant at $300.00 a month. Appellant arranged to have himself made chairman of the Purchasing and Distribution Committee of the Board, and at a meeting of that committee over the initial objection of the purchasing agent and another member of the committee, persuaded the committee to recommend an award to the Jack and Jill Ice Cream Company, his tenant, of a contract six times the amount that was originally suggested. As a chairman of the committee appellant affixed his signature to the bid tabulation sheet recommending to the Board the award of an ice cream contract to Jack and Jill Company and directed the staff to work an allocation to the company in the sum of approximately $90,000.00. Thereafter, on his motion and with appellant's affirmative vote the Board approved his report and a contract was awarded to the company. Prior to the meeting, appellant had already received a $600.00 cashier's check from Bresler in accordance with their arrangements covering the first and last month's rent on appellant's store.

Thus, under the facts of the instant case, appellant consciously, deliberately and intentionally created an interest in a contract about to be awarded by the Board of which he was a member, and, in addition, as a member of the Board actively participated in effecting a contract with his tenant. Thus, appellant acted affirmatively and did have some control over the actions of the Board in awarding the contract to his tenant; appellant did have knowledge of his interest, and, in fact, failed to disclose this interest to the other members of the committee and the Board; appellant was neither absent from the meetings nor did he disqualify himself, but in fact voted affirmatively to

bring about this contract. Under these facts it cannot be said that a trap was set for appellant by these statutes, nor is he being held accountable for the acts of others. The statutes as applied to these facts are clearly constitutional. Appellant is in no position to challenge their constitutionality on the basis of hypothetical facts not only unsupported by the record but actually contradicted by it.

Conclusion

Appellee moves for dismissal of the appeal or an affirmance of the judgment, and for the foregoing reasons opposes the taking of jurisdiction in the instant case by this Honorable Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 662.

OLIN E. DARBY,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Reply to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.

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IN THE

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OLIN E. DARBY,

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PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Reply to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant, in reply to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, respectfully represents:

This is a case of first impression. The constitutionality of the California interest statutes has not, before this case, been determined by any court, and, so far as appellant is able to ascertain, no similar statutes of other jurisdictions have been before this Court.

This appeal is based on the grounds that (1) the California interest statutes, purporting to make it a crime for a member of a school board to be "interested in any contract made by the board," lack the elements of an act of commission or omission and guilty knowledge required of a statement of a public offense by the Fourteenth Amend-

ment, and (2) that defining a crime in terms of being "interested" is too nebulous, equivocable and subjective on its face to meet the certainty requirements of the Fourteenth Amendment, and that by the construction given the term by the court below the gravamen of the offense is reduced to the state of mind of the accused board member.

To these grounds, appellee replies and moves to dismiss on the grounds that (1) the statute does denounce acts of commission or omission, which it and the court below define to be the act of "creation" of an interest or, alternately, the act of "continuing" an interest after knowledge of its existence; (2) the term "interested" has sufficiently definite meanings to meet constitutional requirements, and (3) that by appellee's version of the facts appellant did perform acts, whether these requisites to constitutionality are contained within the statute or not.

I.

The Interest Statute Lacks the Constitutional Requisites of an Act of Commission or Omission and Guilty Knowledge; Efforts by Appellee and the Court Below to Read These Elements Into the Statutes Go Beyond Its Face.

The pertinent statute provides, "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member" (*Education Code*, Sec. 1011; see also, *Government Code*, Sec. 1090). For this status of being "interested" the court below has held that another statute in another code (*Government Code*, Sec. 1097), affixes a severe criminal penalty, including permanent disqualification from public office.

Appellant presented points and authorities in his Jurisdictional Statement that the statute denounces no act of the board member, since the only reference to him is to his status of being interested, which status includes no act on his part, but that the only act which by the face of the statute could bring it into operation is the act of the seven man board in awarding a contract. Thus, what the statute by its terms and on its face provides is that the act of the board in awarding a contract shall render the status of one of its members holding a legitimate pre-existing property interest into a crime, regardless of whether the member acts upon or even knows of the contract.

Appellee concedes that to constitute a valid statement of a public offense within the requirements of the Fourteenth Amendment, the statute must specify the act of omission or commission which subjects the accused to the designated punishment. That " 'A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it,' " as is quoted from Blackstone's Commentaries by this Court in *Schick v. United States,* 195 U. S. 65, 69, is one of the maxims of the Constitution.

To supply this prerequisite, the court below holds that "possession of an interest" constitutes the crime denounced by the statute, and "that the act which creates the public offense is the defendant's creation of a situation whereby he becomes interested" or, alternatively, "continuing to maintain the interest and failing to divest himself of it after knowledge."

Neither of these alternative statements of what constitutes the guilty act can be found within the language

of the statute. Not the court, but the Legislature must state what act or omission subjects a person to criminal punishment.

> "One may be subjected to punishment for crime . . . only for the commission or omission of an act defined by statute, and then only if punishment is authorized . . ."
>
> *Viereck v. United States,* 318 U. S. 236, 241.

> "It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'"
>
> *United States v. Eaton,* 144 U. S. 677, 687.

As to the court's first definition of the guilty act, the statute does not purport to state that no board member shall create a situation whereby he acquires an interest in the board's contracts. If such were the language of the statute, it would serve to prohibit a subsequent act of acquisition toward an existing contract. As written, the statute does not even purport to include such creation or acquisition of an interest in existing contracts within its prohibition. By unanimous holdings of authorities cited in the Jurisdictional Statement there can be little legal question but that the interest referred to in the statute must exist at the time the contract is made. (*Escondido Lumber Co. v. Baldwin,* 2 Cal. App. 606; *Martin Bros. v. City of Concord,* 110 Cal. App. 2d 215; *Oakland v. California Construction Company,* 15 Cal. 2d 573; *People v. Deysher,* 2 Cal. 2d 141.)

The court below states that a board member "has an interest the moment he places himself in a situation where

his personal interest will conflict . . ." with his public duty, but by the four authorities cited, no interest can exist until a contract is awarded, so placing himself in a prospective situation can neither define the "act" nor the "moment" of violation. In *Martin v. City of Concord, supra*, the public official divested himself of any participation before the contract was awarded, and it was held not to be void. In *Escondido Lumber Co. v. Baldwin, supra*, the public official's interest did not arise until after the contract was awarded, and it was held not to be void.

From such interpretations by the State courts as well as by the language of the statute, it is impossible to read any act of violation into the statute except the act of the board in awarding a contract. Thus, the only reasonable reading of the language of the statute is that this act of a board awarding a contract affecting some pre-existing interest of one of its members makes such member guilty of a crime. Whether or not the guilty member participated in the act of awarding the contract or even knew of it are not elements of the offense stated by the statute. No act and no knowledge is required for a member's interest to be affected.

Appellee's and the State court's alternative statement of what act the statute denounces is "continuing to maintain the interest" or "failing to divest himself of it after knowledge." If such interpretation were read into the statute, a violation thereof would comprise two successive elements: (1) that a board member acquire knowledge that his property holdings vested in him an interest in a school contract, and (2) that he fail thereafter to divest himself of the property, or as the court below proposes, "avoid criminal liability by resigning from his office."

This final choice presented by the court below reveals starkly the national necessity of adhering to the constitutional requirements that a person cannot be held criminally responsible under a statute which requires no act or knowledge for violation, for such a statute as the one at issue leaves a property holder with no choice but to resign office or leave his fate to the acts of others.

As said in *Communications Assn. v. Douds,* 339 U. S. 382, 413:

> "And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable."

However, this second construction of what constitutes the guilty act under the statute again reads into it what is not there. What this latter interpretation undertakes is to insert into the statute a crime of omission. Appellant will not argue whether a Legislature could constitutionally create a duty on the part of public officers to divest themselves of lawful property and punish the omission to do so as a crime. Whether or not California's Legislature could constitutionally order the members of its school boards to sell their affected properties or resign, this it clearly has not done in the instant statute. By the authorities cited *supra*, the prohibited interest attaches when the contract is made. No matter how promptly he acted,

a member could not cleanse his guilt by "divesting himself after knowledge." Thus he is trapped. He is guilty when the board acts without any act or knowledge of his own, and he cannot extricate himself after he acquires knowledge.

Appellee fails to answer appellant's point that the statute requires no knowledge of the board's act to make one of its members criminally liable. As seen, since the only act committed is an act of the board, a member's interest could be affected in his total ignorance. To this point appellee answers only, as the court below did, that the statute is of a class which does not require specific intent. This is not an answer. It is beside the point. Appellant does not contend that specific intent is required. Appellant does contend that knowledge is required as an element of the offense, and that this statute, purporting as it does to render a person criminally liable for the acts of others without either his knowledge or complicity, is invalid under the Fourteenth Amendment.

The necessity of the element of knowledge in a statute is stated in *Boyce Motor Lines v. United States*, 342 U. S. 337, 342:

> "The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid."

Again in *Communications Assn. v. Douds*, 339 U. S. 382, 413, this Court upheld the constitutionality of the statutes at issue on the ground that they condemned only persons with knowledge, stating that "no honest, untainted interpretation of those words is punishable removes the possibility of constitutional infirmity."

Dennis v. United States, 341 U. S. 494, 516, summarizes the requirements on the face of a criminal statute of an act committed or omitted with knowledge,

> ". . . it . . . serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand."

The statutes at issue on this appeal are not of the purely regulatory class, for violation of which a State may impose a penalty without culpable knowledge, such as the regulation of the sale of poisonous food or drugs. (*United States v. Balint*, 258 U. S. 250.) The statutes at issue here on their face purport to inflict imprisonment and permanent disqualification from public office for the acts of others affecting the accused's interest without either his knowledge or participation.

As is stated in *Dennis v. United States, supra*, at page 500,

> "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

II.

The Term "Interested" Used Alone to Define a Public Offense Is Too Equivocable, Variable and Subjective to Meet the Constitutional Requisite of Certainty, and as the Term Is Construed by the Court Below the Statute Applies Sanctions Solely to a Public Official's State of Mind.

On this point, the court below sustained the constitutionality of the challenged statutes on the ground that "No reasonably intelligent person can fail to understand the meaning of 'interest' or the significance of 'contract.'" A reasonable man on inquiry would come upon the dictionary definition of interest cited by appellee as "a right, title, share, or participation in a thing . . .," and appellee concedes that the courts have generally held "that the interest referred to in these statutes is a financial or proprietary interest" (Appellee's Statement p. 15).

Yet the court below affirmatively holds that the term is not so employed in the instant statutes in this accepted sense of a proprietary interest or a right to share in the proceeds of a contract, stating that the statute "does not signify that a member of the Board of Education is merely inhibited from sharing directly in the profits or advantages to be derived from a contract made by the board . . ."

With all its colored and repetitious versions of the facts of this case, outside the record before this Court, appellee does not, and never has, contended that appellant had any "right, title, share, or participation" or any "proprietary interest" in the ice cream contract awarded by

the Board of Education. At best the facts established appellant as a landlord to associates of the contracting firm.

Since its case did not show that appellant had any such interest in the school contract, appellee to encompass appellant submits another and completely subjective definition of the term, which is the definition applied by the court below. By this definition, and the court below holds, the statute applies to "any personal interest which would prevent the public officer from exercising absolute loyalty and undivided allegiance to the best interest of the community he serves so that he is absolutely free from any influence other than that which may grow out of the obligations he owes the public." To this proposition appellant cites five California civil decisions which apply this divided loyalty definition of interest in determining whether public contracts are voidable under a civil remedy provided by Section 1092 of the *Government Code*. (Appellee's Statement p. 16.) The decision below applies this same subjective definition of "absolute loyalty" and "undivided allegiance" to the statutes as applied criminally.

From authorities cited, it is clear, therefore, that California courts may and have defined and applied the term "interested" in at least two distinct and unrelated meanings, one completely objective, the other completely subjective. Decisions cited by both appellant and appellee, as well as the decision now appealed, demonstrate this ambiguity forcibly. A public official could have no way of ascertaining, either from the language of the statute or from the decisions, which meaning of the term interest would be employed to indict him. How guide his affairs? He could satisfy himself that he was innocent of any proprietary or pecuniary interest in a proffered contract and thereafter find himself accused of a loyalty or an

allegiance, say to his church, political party, or friends, that meet the subjective tests of guilt, such as an interest, to use language of the court below, "that will tend to cause the member to favor . . ." or "that he prefers the execution of a proposed contract . . ."

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation."
>
> *Boyce Motor Lines v. United States*, 342 U. S. 337, 340.

By dictionary definitions, the words "interest" and "interested" are susceptible of many and varied meanings, almost all of which refer to a mental attitude. As a verb "interest" is given five different meanings by *Funk & Wagnalls Unabridged Dictionary*, all of which refer to a state of mind. The participle "interested" has one objective definition out of three, "Having a possessory interest; being a part owner; as one interested in railroad shares." Of ten uses of the word "interest" as a noun, one is, "That which is of advantage or profit; participation in profit." Among a number of subjective definitions of the noun "interest" the *Oxford English Dictionary*, Volume V, page 393, gives a full definition of its use in an objective sense:

> "The relation of being objectively concerned in something, as by having a right to, title to, or a claim upon, or a share in.
>
> "(a) The fact or relation of being legally concerned, legal concern in a thing; esp. right or title to property or to some of the uses or benefits pertaining to property . . .

"(c) Right or title to a share in something; share, part.

"(e) Esp. a pecuniary share or stake in, or claim upon anything; the relation of being a part owner of property, a shareholder or bond holder in a commercial or financial undertaking or the like."

A long line of decisions apply this objective definition of the term "interested" as used to disqualify a judge. (*Tumey v. United States,* 273 U. S. 510; *Cuyamaca Water Co. v. Superior Court,* 193 Cal. 584; *Lassen v. Superior Court,* 151 Cal. 357, 361; *Elliot v. Superior Court,* 168 Cal. 727; *Meyer v. City of San Diego,* 121 Cal. 102.) The court below cites many more cases to the point that a judge is not disqualified unless his interest is "direct, proximate, substantial and certain" and he will "gain or lose" by the judgment. But the court holds these tests do not apply to "interest" as used in the instant statutes, saying "As applied to judges, 'interest' has a highly special and definite meaning." (See also *Goodspeed v. Great Western Power Co.,* 19 Cal. App. 2d 435, 444.)

However, *Marculescu v. City Planning Commission,* 7 Cal. App. 2d 371, 374-375, examines the use of the word "interested" as found in a number of California procedural statutes and concludes that it has the same meaning in them as in the disqualification cases.

Likewise, in many civil cases under the very statutes at issue here the same "gain or lose" test applied to judicial disqualification is applied to other public officials, that is, that to be interested a public officer must have a right to participate in benefits or a duty to share detriments flowing from the contract. (*Martin Bros. v. City of Concord,* 110 Cal. App. 2d 215; *People v. Becker,* 112 Cal. App. 2d 324; *Escondido Lumber Co. v. Baldwin,* 2 Cal.

App. 606; *People v. Deysher*, 2 Cal. 2d 141; *Berka v. Woodward*, 125 Cal. 119; *Kennedy v. City of Gustine*, 199 Cal. 251; *Osburn v. Stone*, 170 Cal. 480; *Moody v. Shuffleton*, 203 Cal. 100; *Nielsen v. Richards*, 75 Cal. App. 680.)

The same rule is found in other states under statutes similar to the ones at issue here. (*Smedley v. Kirby*, 120 Mich. 253, 79 N. W. 187; *Wayman v. Cherokee*, 204 Iowa 675, 215 N. W. 655; *Moses v. Julian*, 45 N. H. 52, 57; *Conklin v. Crosby*, 29 Ariz. 60, 239 Pac. 506; *Finn v. State*, 66 Ind. App. 432, 114 N. E. 9; *Commonwealth v. Strickler*, 259 Pa. 60, 102 Atl. 282.) In passing, it should be noted that the latter case and *Moses v. Julian, supra*, hold that a landlord holds no "interest," as used in statutes there involved, in the contracts of his tenants.

In *Panozza v. City of Rockford*, 306 Ill. App. 443, 28 N. E. 2d 748, 754, the Illinois court after examining interest cases of various classes in various states, concludes:

> "We find no cases which were decided under any other rule than that the interest in a contract which disqualifies a public officer from executing such a contract in his official capacity, must be pecuniary. As is stated in *Meyer v. City of San Diego*, 121 Cal. 102, 53 P. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22, such interest must be certain, definable, pecuniary, or proprietary."

Nevertheless, there are decisions under these statutes in civil cases, as appellee cites, which find that no such proprietary or pecuniary interest is required to constitute the interest referred to in the instant statutes. These decisions apply the subjective "divided allegiance" definition of interest.

Indeed, some decisions, as did the court below, affirmatively repudiate the proposition that "interest" implies a financial interest. This is found in *Miller v. City of Martinez*, 28 Cal. App. 2d 364, 370, *supra*, which states:

> "It would thus appear that the 'interest' need not involve any direct financial gain upon the part of the public official. It may be any interest which would prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves."

Likewise, *Hobbs, Wall & Co. v. Moran*, 109 Cal. App. 316, 319, states:

> "The purpose of the statute is to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty.
>
> "Nothing in the relationship of a public officer should prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves."

Berka v. Woodward, 125 Cal. 119, 128, states:

> "He cannot be permitted to place himself in any situation where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation."

Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 602, states:

> "If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void . . ."

The subjective definition announced in these civil decisions has now been applied by the court below to the statute as a statement of a crime. These authorities reveal, more forcibly than could this appellant, just how equivocable the statute is, since as seen two long lines of decisions have come down opposed to and inconsistent with each other. Which test shall a trial court follow? How shall a jury decide between two such irreconcilable measures of guilt? And lastly, which definition should a "reasonable man" follow as a guide to his conduct, or, as the court below suggests, is the only safe course for a reasonable man to resign from public office if he does not choose to hazard the alternative of criminal liability?

Confusing as it is, this is not the only equivocation and ambiguity in the language of the statute. The decisions quoted above are practically unanimous that "interested," regardless of the statute in which the term is employed, "embraces only an interest that is direct, proximate, substantial and certain but not a remote, indirect, contingent, uncertain and shadowy, interest." (*Marculescu v. City Planning Commission*, 7 Cal. App. 2d 371, 375; *Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 252.) "It must be certain, and not merely possible or contingent." (*Meyer v. San Diego*, 121 Cal. 102, 109; *Goodspeed v. Great Western Power Co.*, 19 Cal. 2d 435, 446.)

Meyer v. City of San Diego, supra, page 108, which has become a landmark authority on what constitutes prohibitive interest, quotes the following delineating principle from *Northampton v. Smith*, 11 Met. 390 (Mass.):

> "'We think it is not to be a mere possible, contingent interest, not an interest in the question or general subject to which the matter requiring adjudi-

> cation relates, but one that is visible, demonstrable, and capable of precise proof. . . . It must, therefore, depend upon facts capable of being precisely averred and proved, and thus put in issue and tried.'"

Nevertheless, the meaning of the statute is so ambiguous and equivocable that the court below holds that the interest denounced may be "contingent or remote and yet influence the member's judgment," which under the subjective definitions applied by the court would render him guilty. Encompassing contingent or remote interests within the statute's meaning, the court below approved instructions to that effect given to the jury. [Instruction A, footnote to court's opinion.] That the trial court found itself completely confused by the term "interested" is apparent when it also instructed the jury at the same time that a "mere possible, contingent interest" was not within the statute. [Instructions B and C, footnote to court's opinion.] This left the ambiguity up to the jury, which was thus given its choice whether guilt under the statute could be found on the "contingent possibility of pecuniary benefits" or "potential" benefits [Instruction A] or could not be so found [Instructions B and C]. Presumably, with a statute of such double meanings, a trial court could do no better. However, as the court below states, a jury could acquit under the latter instructions, or convict under the former, as they chose to select between conflicting definitions of guilty interest. As for the court itself, it finds that the instruction that "interested" as used in the statute includes a "contingent possibility" or "potential" benefit "is a correct statement of the law" and that in giving instructions to the contrary the trial court was "generous" and gratuitously "gave appellant an advantage."

In summary, therefore, we have seen decisions in juxtaposition to support such divergent and contradictory definitions of the "interest" denounced by the statute as these:

1. That the statute means a "certain, definable, pecuniary, or proprietary interest," a right to share or participate in the contract, a right or duty "to gain or lose" in the event of suit.

2. That the statute does not imply financial interest or gain but means "any influence" or "any situation" which would cause an official to "tend to favor," "tend in any degree to influence" or to "prefer" one contract over another, or any state of mind that measures less than "absolute" loyalty or "undivided" allegiance.

3. That the interest cannot be "merely possible or contingent" but must be "direct, proximate, substantial and certain"; it must be "visible, demonstrable, and capable of precise proof."

4. That the interest condemned by the statute may be "contingent or remote" or "the contingent possibility of pecuniary benefits."

A statute capable of such shifting and double meanings cannot stand under the test of an ascertainable standard of conduct required of a criminal statute by the Fourteenth Amendment.

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."
>
> *Lanzetta v. New Jersey*, 306 U. S. 451, 453.

III.

Appellee's Statement and Motion Are Based on Its Version of the Facts but the Constitutionality of the Statutes Can Only Be Judged on Their Face and as Construed by the Court Below.

Appellee did not take advantage of its opportunity to designate any part of the factual record to be transmitted to this Court, but the third point of its Statement and Motion goes completely outside the record to state its version of facts by which it obtained a jury verdict on one count of the indictment and an affirmation on appeal by a divided court. Although appellant denies that appellee's statement of facts is supported by the record, this appeal is not and will not be an answer to such allegations, nor even a petition for certiorari on grounds that a fair trial of the facts was denied.

This is an appeal on a substantial federal question heretofore unadjudicated except by the court below: whether the California interest statutes, for violation of which appellant is the first member of a school board to be indicted in the State's history, meet minimum standards required of the statement of a public offense by the Fourteenth Amendment to the Federal Constitution. That question can only be determined by the language of the statutes on their face and as its terms are construed by the court below, and whether appellant did or did not lease to associates of a future bidder on a school contract is not material to that issue. Appellant has and will confine himself to the constitutional question which has now been

properly presented to this Court. He will not be diverted by appellee's heretofore successful hypothesis that facts make the law.

When a statute is unconstitutional on its face a person who has been convicted for violation thereof is the proper person to challenge its constitutionality, and on such issue the details of the purported violation are immaterial.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. *Cf. United States v. Reese,* 92 U. S. 214, 221; *Czarra v. Board of Medical Supervisors,* 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."
>
> *Lanzetta v. New Jersey,* 306 U. S. 451, 453.

Appellee contends that the issue here is hypothetical and abstract, citing *Bandini v. Superior Court,* 284 U. S. 8, 22, holding that a statute valid on its face will not be declared void on the ground of possible invalid application. Such is not the case here. This appeal is a challenge to the constitutional validity on their face of statutes of which appellant was convicted and for violation of which punishment was assessed.

Nothing is moot or hypothetical to a public official permanently degraded by a statute which on its face renders him punishable solely as a result of the act of a board of which he happens to be a member in awarding a contract to the low bidder, as it is required by law to do, which statute purports to define a crime in terms so

nebulous that courts may read into it definitions that render the offense nothing but the state of mind of the accused. This Court made the distinction which establishes that this case is properly before it in *Smith v. Cahoon*, 283 U. S. 553, 562:

> ". . . one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. . . . This principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right. In the present instance, the appellant has been arrested and held for trial. He is in jeopardy, and the state court, entertaining his application for discharge, has denied the constitutional right asserted. The question of the validity of the statute, upon which the prosecution is based, is necessarily presented."

As is stated in *Lovell v. Griffin*, 303 U. S. 444, 452, 453, ". . . the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." (See also *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 362; *Corn Products v. Eddy*, 249 U. S. 427, 432; *Sully v. American National Bank*, 178 U. S. 289, 299-300.)

Appellant submits that the statute in the case at bar is unconstitutional and void on its face, and since he has been convicted under it, he is the proper party to raise

the question. Whether his conduct was culpable begs the question and is immaterial to the issue of whether the statutes under which the facts were tried contain a constitutionally valid statement of a public offense. As stated in *Stromberg v. California*, 283 U. S. 359, 368-369:

> "We are thus brought to the question whether any of the three clauses, as construed by the state court, is upon its face repugnant to the Federal Constitution so that it could not constitute a lawful foundation for a criminal prosecution. . . .
>
> "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment. The first clause of the statute being upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside."

Conclusion.

For the foregoing reasons appellant submits that appellee's Motion to Dismiss or Affirm should be denied and jurisdiction of this appeal should be noted.

Respectfully submitted,

BATES BOOTH and
GERTRUDE GREENGARD,
Counsel for Appellant.

Per Curiam Decisions.

No. 662. DARBY *v.* CALIFORNIA. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Bates Booth* for appellant. *Edmund G.*

Brown, Attorney General of California, *Frank W. Richards*, Assistant Attorney General, and *Dan Kaufmann*, Deputy Attorney General, for appellee. Reported below: 114 Cal. App. 2d 412, 250 P. 2d 743.